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No. 90-493

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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DAVID O. CONGER, LEONARD H. ALSENE, THOMAS S. HODGES, PATRICK R. LEON, DENNIS PFROMMER, STARLING ROBERTS, JR., DOMINIC M. SKINNER, and CHRIS YOUNG,

*Petitioners*,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, *and* APPENDIX TO PETITION**

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EDWIN VIEIRA, JR.,
*Counsel of Record*
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

HUGH L. REILLY
National Right to Work Legal Defense Foundation
8001 Braddock Road
Springfield, Virginia 22160
(703) 321-8510

*Attorneys for Petitioners*

## QUESTIONS PRESENTED

I. Did the District Court lack subject-matter jurisdiction to hear petitioners' claims that respondent National Labor Relations Board ("NLRB") violated Sections 9 and 10 of the National Labor Relations Act ("NLRA"),[1] or that those sections as the NLRB applied them to petitioners are repugnant to the First and Fifth Amendments to the Constitution of the United States, where

- the NLRB has imposed, under its so-called "accretion doctrine", respondent International Brotherhood of Electrical Workers, Local 199, AFL-CIO ("Local 199") on petitioners as their "exclusive representative",[2] without allowing petitioners to participate in an election among employees, without providing petitioners notice, an opportunity to be heard on the issue, or judicial review of such designation of Local 199, and without affording petitioners—indeed, actively opposing—any other procedural protections for their rights under the NLRA or the Constitution;

- the NLRA has openly admitted that its accretion doctrine "effectively works to deny the accreted employees a right to vote on their choice of bargaining representative", that "[e]mployees do not have a right [under NLRB rules] to a hearing in accretion cases", that "no [NLRA] statutory review procedure exists allowing an employee to appeal a[n

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[1] 29 U.S.C. §§ 159 and 160. The text of all NLRA sections cited herein is reproduced in the Appendix hereto ("App.") at 81a. Hereafter, citation will be to the statutory sections alone.

[2] *See* NLRA § 9(a).

NLRB] representation proceeding", and that "[t]his procedure is unfair to everyone";[3] and

- petitioners have alleged without contradiction that the NLRB's imposition of Local 199 as their exclusive representative has significantly reduced the compensation, benefits, and quality of working conditions they receive?

**II.** Under the foregoing circumstances did the District Court properly dismiss *sua sponte* and without any articulated reason petitioners' complaint against Local 199 for violation of its duty of fair representation, even though Local 199 had neither moved to dismiss under Federal Rule of Civil Procedure 12 nor sought any other relief for which dismissal of the action was arguably appropriate?

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[3]Memorandum of Law in Support of Motion of NLRB to Dismiss Complaint for Lack of Jurisdiction, CA No. 88-143-CIV-FTM-10-C (M.D. Fla., filed 13 January 1989), in App. at 49a n.12, 50a, 50a n.13.

## PARTIES TO TIIE PROCEEDINGS BELOW

The caption of this petition lists all the parties to the proceedings below except plaintiff John Todd, who has decided to forego further participation in this case.

## TABLE OF CONTENTS

*Page*

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDINGS BELOW ..... iii

TABLE OF CONTENTS ..... iv

TABLE OF AUTHORITIES ..... vi

INTRODUCTION ..... 2

OPINIONS BELOW ..... 2

JURISDICTION ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 7

I. Because dismissal of petitioners' complaint against the NLRB for an alleged lack of jurisdiction over the subject-matter licenses the NLRB to strip nonunion employees of their liberty and property without notice or hearing, the dismissal throws into serious doubt the constitutionality of the NLRA's scheme of exclusive representation as applied in accretion-cases. ..... 11

II. Because dismissal of petitioners' complaint against Local 199 gratuitously excuses the union's violation of its duty of fair representation, the dismissal throws into serious doubt the NLRA's scheme of exclusive representation as applied in accretion-cases ..... 23

TABLE OF CONTENTS - CONTINUED

*Page*

CONCLUSION ..... 28

APPENDICES

A. Judgment of the Court of Appeals (28 June 1990) ..... 1a

B. Order of the District Court (3 July 1989) ..... 3a

C. National Labor Relations Board Decision and Clarification of Bargaining Unit (11 February 1988) ..... 9a

D. Docket in the District Court ..... 23a

E. Petitioners' Complaint in the District Court (5 October 1988) ..... 27a

F. Motion of the National Labor Relations Board to Dismiss Complaint in the District Court (13 January 1989) ..... 35a

G. Memorandum of Law in Support of the Motion of the National Labor Relations Board to Dismiss Complaint in the District Court (13 January 1989) ..... 38a

H. Answer Incorporating Defenses of IBEW Local 199 (10 January 1989) ..... 71a

I. Motion to Join Indispensable Party of IBEW Local 199 (10 January 1989) ..... 76a

J. Constitutional and Statutory Provisions Involved ..... 80a

## TABLE OF AUTHORITIES

*Page*

**Cases**

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) ..... 7

AFL v. NLRB, 308 U.S. 401 (1940) ..... 11

Anders v. California, 386 U.S. 738 (1967) ..... 18

Baker v. Carr, 369 U.S. 186 (1962) ..... 3, 18

Bell v. Hood, 327 U.S. 678 (1946) ..... 12-13, 18

Bowles v. Willingham, 321 U.S. 503 (1944) ..... 10

Brannan v. Stark, 342 U.S. 451 (1952) ..... 22

Carter v. Carter Coal Co., 298 U.S. 238 (1936) ..... 15

J. I. Case Co. v. NLRB, 321 U.S. 332 (1944) ..... 15, 26

Chicago Teachers Union, Local No. 1 v. Hudson,
475 U.S. 292 (1986) ..... 10-11

Communications Workers v. Beck,
487 U.S. 735 (1988) ..... 16, 23

Consolidated Edison Co. v. NLRB,
305 U.S. 197 (1938) ..... 10-11, 19-20

Duke Power Co. v. Carolina Environmental
Study Group, Inc., 438 U.S. 59 (1978) ..... 18

Fay v. Douds, 172 F.2d 720 (2d Cir. 1949) ..... 17

TABLE OF AUTHORITIES - CONTINUED

*Page*

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) ..... 26

Goosby v. Osser, 409 U.S. 512 (1973) ..... 18

Hagans v. Levine, 415 U.S. 528 (1974) ..... 18

Heiner v. Donnan, 285 U.S. 312, 326 (1932) ..... 9

Hitchman Coal & Coke Co. v. Mitchell,
245 U.S. 229 (1917) ..... 7

Joint Anti-Fascist Refugee Committee v. McGrath,
341 U.S. 123 (1951) ..... 19

Land v. Dollar, 330 U.S. 731 (1947) ..... 3

Leedom v. Kyne, 358 U.S. 184 (1958) ..... 17

Machinists v. Street, 367 U.S. 740 (1961) ..... 23

McCulloch v. Sociedad Nacional de Marineros
de Honduras, 372 U.S. 10 (1963) ..... 17

McLain v. Real Estate Board of New Orleans, Inc.,
444 U.S. 232 (1980) ..... 3

Medo Photo Supply Corp. v. NLRB,
321 U.S. 678 (1944) ..... 26

Milheim v. Moffat Tunnel Improvement District,
262 U.S. 710 (1923) ..... 18

TABLE OF AUTHORITIES - CONTINUED

*Page*

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) ..... 12

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) ..... 10, 19

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) ..... 21

NLRB v. General Motors Corp., 373 U.S. 734 (1963) ... 23

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) ..... *passim*

NLRB v. Local 23, Food Workers, ___ U.S. ___, 108 S. Ct. 413 (1987) ..... 27

Neitzke v. Williams, ___ U.S. ___, 109 S. Ct. 1827 (1989) ..... 18

Newburyport Water Co. v. Newburyport, 193 U.S. 561 (1904) ..... 18

Oneida Indian Nation of New York State v. County of Oneida, New York, 414 U.S. 661 (1974) ..... 18

Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941) ..... 10

Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) ..... 15, 26

Ex parte Poresky, 290 U.S. 30 (1933) ..... 18

TABLE OF AUTHORITIES - CONTINUED

*Page*

Radio Officers' Union v. NLRB, 347 U.S. 17 (1954) .... 25

Railway Employes' Department v. Hanson,
351 U.S. 225 (1956) ..... 23

A.L.A. Schechter Poultry Corp. v. United States,
295 U.S. 495 (1935) ..... 14-15

Smith v. Kansas City Title & Trust Co.,
255 U.S. 180 (1921) ..... 11

Steele v. Louisville & Nashville Railroad,
323 U.S. 192 (1944) ..... *passim*

Truax v. Raich, 239 U.S. 33 (1915) ..... 9

United Building & Construction Trades Council
of Camden County v. Mayor & Council of Camden,
465 U.S. 208 (1984) ..... 9

Vaca v. Sipes, 386 U.S. 171 (1967) ..... 16, 26-27

Virginian Railway v. System Federation No. 40,
300 U.S. 515 (1937) ..... 15-16, 26

Wallace Corp. v. NLRB, 323 U.S. 248 (1944) ..... 26

TABLE OF AUTHORITIES - CONTINUED

*Page*

**Constitutional provisions, statutes and rules**

United States Constitution

Article I, Section 8, Clause 3 ..... 9

Article IV, Section 2 ..... 9

First Amendment ..... *passim*

Fifth Amendment ..... *passim*

Fourteenth Amendment ..... 9

Bituminous Coal Conservation Act, Act of 30 June 1935, ch. 824, 49 Stat. 911 ..... 14

National Industrial Recovery Act, Act of 16 June 1933, ch. 90, 48 Stat. 195 ..... 14

National Labor Relations Act

§ 1, 29 U.S.C. § 151 ..... 2-3, 16

§ 7, 29 U.S.C. § 157 ..... *passim*

§ 8(a)(3), 29 U.S.C. § 158(a)(3) ..... 16

§ 9, 29 U.S.C. § 159 ..... *passim*

§ 9(a), 29 U.S.C. § 159(a) ..... *passim*

TABLE OF AUTHORITIES - CONTINUED

*Page*

§ 9(b), 29 U.S.C. § 159(b) . . . . . 4, 16

§ 9(c)(1), 29 U.S.C. § 159(c)(1) . . . . . *passim*

§ 9(d), 29 U.S.C. § 159(d) . . . . . 5, 19

§ 10, 29 U.S.C. § 160 . . . . . 1, 13-14, 20

§ 10(b), 29 U.S.C. § 160(b) . . . . . 20

§ 10(c), 29 U.S.C. § 160(c) . . . . . 19

§ 10(e), 29 U.S.C. § 160(e) . . . . . 2-3, 5, 19

§ 10(f), 29 U.S.C. § 160(f) . . . . . 3, 5, 19

Railway Labor Act, Act of 20 May 1926, ch. 347, 44 Stat. 577 (current version at 45 U.S.C. § 151 *et seq.*) . . . . . 15, 23, 26

United States Code

28 U.S.C. § 1254(1) . . . . . 2

28 U.S.C. § 1331 . . . . . 5, 12-13

28 U.S.C. § 1337 . . . . . 5, 12-13

Federal Rules of Civil Procedure

Rule 12 . . . . . *passim*

Rule 12(b)(1) . . . . . 3, 5, 23

TABLE OF AUTHORITIES - CONTINUED

*Page*

Rules of the Supreme Court of the United States

Rule 10.1(c) ..... 7

Rule 13.1 ..... 2

**Miscellaneous**

Arguments in Cases Arising Under the Railway Labor Act and the National Labor Relations Act Before the Supreme Court of the United States, February 8-11, 1937, S. Doc. No. 52, 75th Cong., 1st Sess. (1937) ..... 15

Comment, *The Mechanics of Collective Bargaining*, 53 Harv. L. Rev. 745 (1940) ..... 16

J.A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law, 1933-1937* (1974) ..... 15

Weyland, *Majority Rule in Collective Bargaining*, 45 Colum. L. Rev. 556 (1945) ..... 16

No. 90-

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DAVID O. CONGER, LEONARD H. ALSENE, THOMAS S. HODGES, PATRICK R. LEON, DENNIS PFROMMER, STARLING ROBERTS, JR., DOMINIC M. SKINNER, and CHRIS YOUNG,

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v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## INTRODUCTION

Petitioners David O. Conger, Leonard H. Alsene, Thomas S. Hodges, Patrick R. Leon, Dennis Pfrommer, Starling Roberts, Jr., Dominic M. Skinner, and Chris Young respectfully pray that a writ of certiorari issue to review the judgment the United States Court of Appeals for the Eleventh Circuit entered against them on 28 June 1990.

## OPINIONS BELOW

The judgment of the Court of Appeals is reproduced in App. at 1a. That court wrote no opinion. The opinion of the District Court is unreported, and is reproduced in App. at 3a. The opinion of the NLRB authorizing the "accretion" of which petitioners complain, Decision and Clarification of Bargaining Unit, *United Telephone Company of Florida* and *Local 199, IBEW*, Case No. 12-UC-75 (NLRB Region 12, 11 February 1988), is reproduced in App. at 9a.

## JURISDICTION

The Court of Appeals entered its judgment on 28 June 1990. The instant petition is filed within ninety (90) days of that date, and is therefore timely under Rule 13.1 of the rules of this Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fifth Amendments to the Constitution of the United States, and Sections 1, 7, 9, 10(e), and

10(f) of the NLRA.[1] These provisions are reproduced in App. at 80a.

## STATEMENT OF THE CASE

This petition arises from the Circuit Court's *per curiam* affirmance of the District Court's explicit dismissal of petitioners' complaint against the NLRB under color of the NLRB's motion pursuant to Federal Rule of Civil Procedure 12(b)(1), and the District Court's further implicit determination that, because of this dismissal, petitioners' claims against Local 199 were also subject to dismissal, notwithstanding the union's failure to move for such relief on any ground within Rule 12.[2]

In March of 1984, petitioners' employer, the United Telephone Company of Florida ("UTC"), formed a separate subsidiary to sell and maintain business-terminal equipment.[3] Petitioners were employees of this subsidiary, but were not represented by any labor organization. In August of 1986, the UTC and

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[1]29 U.S.C. §§ 151, 157, 159, 160(e), and 160(f).

[2]App. at 1a, 3a. Local 199 did file a motion to join petitioners' employer as an indispensable party. *Id.* at 76a. But the District Court disregarded this motion as "moot". *Id.* at 8a. And Local 199 did not raise the matter on appeal. The issue is therefore not ripe for review. *See* Baker v. Carr, 369 U.S. 186, 198 n.16 (1962).

[3]Except where otherwise noted, the facts set out here are alleged in petitioners' complaint, or recited in more detail in Decision and Clarification of Bargaining Unit, *United Telephone Company of Florida* and *Local 199, IBEW*, Case No. 12-UC-75 (NLRB Region 12, 11 February 1988). App. at 27a, 9a, respectively. Because the NLRB's motion to dismiss under Rule 12(b)(1) attacked the complaint on its face, without supporting affidavits or other evidence, this Court must treat the allegations of the complaint as true for purposes of its review here. *See* Land v. Dollar, 330 U.S. 731, 735 n.4 (1947); McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 246-47 (1980).

Local 199 entered into a collective-bargaining agreement, covering employees in the UTC's integral "South Division". On 1 July 1987, the UTC disbanded the subsidiary and replaced it with an integral "Business Services Division" ("BSD"). The BSD's original complement of seven "business technicians" and one "warehouse attendant" (the job-categories into which petitioners fall) came from the defunct subsidiary. Subsequently, two more "business technicians" were hired for the BSD.

Local 199 then claimed that it was the proper NLRA § 9(a) exclusive representative of the employees in the "South Division" of the BSD (including petitioners), under color of the *pre*-existing collective-bargaining agreement with the UTC, even though petitioners remained nonmembers of the union and had indicated no desire to accept its representation. The UTC disputed Local 199's claim, treated the "business technicians" and "warehouse attendant" as unrepresented employees, and petitioned the NLRB under NLRA § 9(b) for a "clarification" of the bargaining-unit.[4] Local 199 counter-filed an unfair-labor-practice charge, contending that the UTC had refused to apply the collective bargaining agreement to a group of communications technicians (that is, petitioners) represented by Local 199.[5] Neither the UTC (which was their employer), nor Local 199 (which claimed to be their NLRA § 9(a) representative), nor the NLRB (the intervention of which supposedly guaranteed their rights under the statute) provided petitioners with notice, or an opportunity to be heard in their own behalf, at any stage of these proceedings.

The NLRB Regional Director for Region 12 determined that "the South Division business technicians and BSD warehouse attendant constitute an accretion to the existing [Local 199

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[4]United Telephone Company of Florida and Local 199, IBEW, Case No. 12-UC-75 (NLRB Region 12, filed 5 August 1987).

[5]Case No. 12-CA-12679 (NLRB Region 12, filed 8 September 1987). Local 199 withdrew this charge after the NLRB "clarified" the unit in its favor.

bargaining-]unit".[6] Neither the UTC nor Local 199 sought review of this determination. And petitioners lacked standing to do so under the NLRA.[7]

Petitioners then brought suit in the District Court, under jurisdictional predicates 28 U.S.C. §§ 1331 and 1337, complaining that, as a result of the accretion and the imposition upon them of Local 199 as their unwanted exclusive representative, they

- had been deprived of the right to represent themselves as to labor-relations matters with the UTC; and

- had suffered a significant reduction in compensation, benefits, and the quality of their working-conditions,

in violation of NLRA §§ 7 and 9, of Local 199's duty of fair representation, and of the First Amendment and the Due Process Clause of the Fifth Amendment to the Constitution of the United States.[8]

Under color of Federal Rule of Civil Procedure 12(b)(1), the NLRB moved to dismiss the complaint for want of jurisdiction over the subject matter.[9] In its memorandum supporting this motion, the NLRB candidly conceded that the District Court "could" have jurisdiction "where a[n NLRB] action raises a substantial question of a violation of constitutional rights", and "if the plaintiff can show that a violation of constitutional rights 'not

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[6]Decision in Case No. 12-UC-75, in App. at 20a (footnote omitted).

[7]*See* NLRA §§ 9(d) and 10(e & f) (review of unit-clarification permissible only in context of review of final order of NLRB adjudicating an unfair labor practice).

[8]Complaint, in App. at 27a. The jurisdictional allegations are contained in Complaint, "Jurisdiction", in App. at 29a.

[9]App. at 35a.

transparently frivolous' has destroyed a vested property right". It also admitted that:

- its accretion-doctrine "effectively works to deny the accreted employees a right to vote on their choice of bargaining representative";

- "[e]mployees do not have a right [under NLRB rules] to a hearing in accretion cases"; and

- "no statutory review procedure exists allowing an employee to appeal a[n NLRB] representation proceeding".

Yet, having further acknowledged that "[t]his procedure is unfair to everyone", the NLRB nevertheless argued that, "[a]s [petitioners] had no right to participate in the unit clarification proceeding, [they] do not have any due process rights which could have been violated".[10]

The District Court accepted this *petitio principi* and granted the NLRB's motion to dismiss.[11] *Sub silentio*, the court also dismissed petitioners' complaint against Local 199, notwithstanding the union's failure to file any motion to dismiss under Federal Rule of Civil Procedure 12.[12] The Court of Appeals affirmed these dismissals without opinion.[13] This petition followed.

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[10] *Id.* at 44a-45a, 49a n.12, 50a, 50a n.13.

[11] *Id.* at 3a.

[12] *See id.* at 23a-26a.

[13] *Id.* at 1a.

## REASONS FOR GRANTING THE WRIT

This case falls squarely, and doubly, within Rule 10.1(c) of the rules of this Court, in that the Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this Court", *and* "has decided a federal question in a way that conflicts with applicable decisions of this Court".

The NLRB's implementation of its accretion doctrine in this case deprived petitioners of both "liberty" and "property" in the constitutional sense:

- the liberty to contract autonomously for their employment and the property embodied in such contracts, protected by the Fifth Amendment;[14]

- the liberty not to associate with unions, protected by the First and Fifth Amendments;[15] and

- the property in the higher level of wages and other benefits of employment to which petitioners were entitled before their accretion into Local 199's bargaining unit.

Even if such deprivations might be constitutionally permissible had petitioners freely designated Local 199 as their exclusive representative or participated in an NLRA § 9 election in which

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[14] *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 250-51 (1917) (freedom of contract in employment "is a part of the constitutional rights of personal liberty and private property").

[15] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977) ("[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests").

a majority of the employees voted for such representation,[16] here:

- petitioners never freely designated Local 199 as their exclusive representative;

- petitioners had no opportunity to participate in an NLRA § 9 election of Local 199 to that position;

- the NLRB issued its accretion *fiat* with no notice to petitioners, no opportunity for them to be heard, and no right for them to seek judicial review of the decision;

- the lower courts, on "jurisdictional" grounds, denied petitioners any right to challenge the NLRB's action in an independent judicial proceeding; and

- the lower courts gratuitously extended the NLRB's immunity to Local 199, excusing the union from even having to offer a rationalization for summary dismissal of petitioners' claims against it.

Neither this Court nor (to petitioners' knowledge) any court other than the two below has ever addressed the profoundly disturbing and important constitutional issues this situation so starkly frames.

This Court has never held — and, petitioners submit, could never hold — that an administrative agency and (worse yet) a private organization exercising *quasi*-governmental powers under color of law[17] may, *without affording any procedural due process*

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[16] Assumptions which no opinion of this Court squarely warrants. *See post*, pp. 14-16.

[17] *See* Steele v. Louisville & N.R.R., 323 U.S. 192, 198-99, 203 (1944) (union acting as exclusive representative under national labor law "is clothed with power not unlike that of a legislature").

*themselves and without fear of review or intervention by the courts*, abridge "the right to work for a living in the common occupations of the community" and to "pursu[e] * * * a common calling" that this Court has extolled as "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure" and as "one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause [of Article IV, Section 2, of the Constitution]".[18] But so much the lower courts here have tolerated.

Moreover, in cases involving almost every imaginable interest in "liberty" and "property", and as many varieties of governmental action, this Court has repeatedly ruled that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality" is timely notice and a meaningful

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[18] Truax v. Raich, 239 U.S. 33, 41 (1915) (Fourteenth Amendment); United Bldg. & Constr. Trades Council of Camden County v. Mayor & Council of Camden, 465 U.S. 208, 219 (1984) (Privileges and Immunities Clause).

The principle *Truax* stated applies to the Fifth Amendment, too, as the Due Process Clauses of both amendments embody the self-same restrictions on governmental action. *See* Heiner v. Donnan, 285 U.S. 312, 326 (1932). And invocation of the spirit of the Privileges and Immunities Clause is equally apt, as a "mutually reinforcing relationship" exists between that clause and Article I, Section 8, Clause 3 (the Commerce Clause), which is the constitutional predicate for all national labor laws, including the NLRA. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

Incoherent indeed would be a constitution, or a court construing it, that simultaneously eulogized the right to work as "the very essence of * * * personal freedom and opportunity" and "one of the most fundamental of [constitutional] privileges" under four interrelated clauses (the Commerce Clause, the Privileges and Immunities Clause, and the Due Process Clauses of the Fifth and Fourteenth Amendments), yet licensed an administrative agency of the government effectively to nullify that right by *fiat* under color of one of those clauses (the Commerce Clause) but in open defiance of the procedural strictures of another (the Due Process Clause of the Fifth Amendment).

opportunity to be heard.[19] And neither an administrative agency in general,[20] nor the NLRB in particular,[21] nor a private labor union acting as an exclusive representative[22] has heretofore been relieved of compliance with this constitutional imperative. But such a dispensation the lower courts here have countenanced.

Finally, this Court has never limited or even questioned the broad procedural-due-process requirement organic to the original formulation of the duty of fair representation that a union purporting to act as nonunion employees' exclusive representative "is required to * * * give [those employees] notice of and opportunity for hearing upon its proposed action[s]".[23] Here, although it unilaterally assumed the status of petitioners' exclusive representative when it filed unfair-labor-practice charges against the UTC and participated as a party to the NLRB's unit-clarification proceedings, Local 199 provided no notice of its actions to petitioners, thereby depriving them of an opportunity even to attempt to intervene in those proceedings. Yet the lower courts approved this nonfeasance *sub silentio*, without even requiring Local 199 to file a formal motion to dismiss under Rule 12.

Thus, this petition presents issues meriting plenary review not only because of their novelty and their self-evident importance to the rights of employees, to the NLRB's administration

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[19]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[20]*See, e.g.*, Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-53 (1941) (hearing must be held before agency's final order becomes effective); Bowles v. Willingham, 321 U.S. 503, 521 (1944) (judical review after administrative orders become effective affords due process under wartime emergency).

[21]*See* Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), *discussed post*, pp. 19-20.

[22]Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).

[23]Steele, 323 U.S. at 204.

of the NLRA, and to the enforcement of the duty of fair representation, but also because of the insouciance with which the lower courts dismissed them in the very teeth of this Court's contrary precedents.

**I. Because dismissal of petitioners' complaint against the NLRB for an alleged lack of jurisdiction over the subject-matter licenses the NLRB to strip nonunion employees of their liberty and property without notice or hearing, the dismissal throws into serious doubt the constitutionality of the NLRA's scheme of exclusive representation as applied in accretion-cases.**

Petitioners' claims against the NLRB[24] depend: (i) upon construction of the NLRA's requirement that, in determination of bargaining-units, "the [NLRB] * * * *shall* provide for an appropriate hearing upon due notice";[25] and (ii) "upon the construction or application of the Constitution"[26] with respect to the requirements of procedural fairness embodied in the Due Process Clause of the Fifth Amendment[27] and in the First Amendment as the latter applies to compulsory unionism.[28] At issue is whether the NLRB must comply with the statutory mandate of notice and hearing in accretion-cases, or whether its accretion-doctrine is itself unconstitutional as applied to petitioners.

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[24]The only claims the District Court could conceivably dismiss on jurisdictional grounds. *Cf.* AFL v. NLRB, 308 U.S. 401 (1940), upon which that court erroneously relied. App. at 5a.

[25]NLRA § 9(c)(1) (emphasis supplied).

[26]Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921).

[27]*See* Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), *discussed post*, pp. 19-20.

[28]*Cf.* Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).

Although petitioners' claims are admittedly novel (in the sense that they raise issues of first impression),

> where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions * * * , *must* entertain the suit. * * *
>
> Jurisdiction * * * is not defeated * * * by the possibility that the averments might fail to state a cause of action on which petitoners could actually recover. For * * * the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jursidiction. * * * The * * * exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.[29]

Neither of these "exceptions" applies here.

*A. The materiality of petitioners' claims.* That petitioners' claims under the NLRA and the Constitution "are not immaterial but form rather the sole basis of the relief sought"[30] against the NLRB both the latter's motion to dismiss and the District Court's opinion confirm. No one impugns these claims as merely pretextual devices to feign jurisdiction under 28 U.S.C. §§ 1331 and 1337.[31]

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[29]Bell v. Hood, 327 U.S. 678, 681-83 (1946) (emphasis supplied).

[30]*Id.* at 683.

[31]This was the argument made and rejected in *Bell*. *Id.* at 680-81. *See also* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 279 (1977).

*B. The substantiality of petitioners' claims.* The substantiality of petitioners' claims is fivefold: *First*, the claims are substantial because petitioners' "right * * * to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another".[32] Specifically, petitioners claim that:

- By imposing on them Local 199 as their NLRA § 9(a) representative without the "appropriate hearing upon due notice" required by NLRA § 9(c)(1), the NLRB's accretion-doctrine violates the latter section.

- If NLRA § 9(c)(1) licenses the NLRB to apply its procedureless accretion-doctrine as it has here, that section is repugnant to the First Amendment and to the Due Process Clause of the Fifth Amendment. And,

- If NLRA §§ 9(c)(1) and 10 withdraw from the District Court jurisdiction it otherwise would exercise under 28 U.S.C. §§ 1331 and 1337, leaving petitioners with no judicial remedy for violations of their statutory and constitutional rights in the instant unit-clarification, then those sections are repugnant to the First Amendment and to the Due Process Clause of the Fifth Amendment.

Self-evidently, decision on these claims turns exclusively on construction of the NLRA and the Constitution.

*Second*, the complaint raises issues of procedural and substantive due process as serious as they are novel.

*a.* As to procedural due process, the absence of "appropriate hearing upon due notice" to petitioners in the accretion-proceeding is undeniable. And that, as a result of the accretion, petitioners have suffered losses of "liberty" and "property" in the

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[32]Bell, 327 U.S. at 685.

constitutional sense is also beyond cavil.[33] The District Court, however, reasoned that petitioners' Fifth-Amendment "right to due process has not been violated" because NLRA § 9(a) overrides their First-Amendment and NLRA § 7 rights to refrain from compulsory union representation; and therefore "they have no recognized property or liberty interest which has been invaded by the [NLRB's accretion-]decision".[34] The fallacy here is both logical and historical.

Logically, the court begged the question. Even if NLRA § 9(a) were compatible with the Constitution *where the NLRB "provide[s] for an appropriate hearing upon due notice"* and *"direct[s] an election by secret ballot"*,[35] it would not necessarily be equally compatible where, as here, the NLRB forces an NLRA § 9(a) representative on unwilling nonunion employees *without ANY notice or opportunity to be heard.* Neither would it necessarily be so compatible were NLRA §§ 9 and 10 construed absolutely to preclude judicial scrutiny at the insistence of aggrieved employees of the NLRB's rules and regulations imposing exclusive representation.

Historically, the court reasoned out of context. This Court has *never* held that NLRA § 9(a) is compatible with the First Amendment or any other constitutional restriction on Congress' power under the Commerce Clause. When schemes of exclusive representation have been before the Court — in cases involving the National Industrial Recovery Act[36] and the Bituminous Coal Conservation Act[37] — the Court declared those schemes unconstitutional, without a dissenting voice, in *Schechter* and

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[33] *See ante*, p. 7.

[34] App. at 8a.

[35] NLRA § 9(c)(1) (emphasis supplied).

[36] Act of 16 June 1933, ch. 90, 48 Stat. 195.

[37] Act of 30 June 1935, ch. 824, 49 Stat. 911.

*Carter*.[38] After *Schechter* and *Carter*, the unconstitutionality of exclusive representation in private employment escaped judicial review on three occasions. When the validity of the NLRA as a legitimate regulation of interstate commerce was first in issue, the NLRB selected its test-cases "intentionally [to] avoid[ ] presenting the Court with th[is] 'touchy' and * * * doubtful question[ ]".[39] And the Court avoided the problem of *exclusive* representation by interpreting NLRA § 9(a) to permit individual employees to bargain directly with their employer.[40] Similarly, in a then-contemporaneous challenge to the Railway Labor Act,[41] the Court held that exclusive representation under that statute, too, allowed individual contracts.[42] These holdings reflected the unanimous position, not only of the Justices, but also of the litigants.[43] Shortly thereafter, the Court again

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[38]A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 311 (opinion of the Court), 318 (Hughes, C.J., concurring) (1936).

[39]J.A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law, 1933-1937* (1974), at 187.

[40]NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

[41]Act of 20 May 1926, ch. 347, 44 Stat. 577 (current version at 45 U.S.C. §§ 151 *et seq*.)

[42]Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 548-49 (1937).

[43]*See* Arguments in Cases Arising Under the Railway Labor Act and the National Labor Relations Act Before the Supreme Court of the United States, February 8-11, 1937, S. Doc. No. 52, 75th Cong., 1st Sess. (1937), at 13, 33-34, 40, 88-89, 118.

Only seven years later, in cases raising issues of statutory construction alone, did the Court purport to re-interpret the acts to preclude individual contracts in some circumstances. J.I. Case Co. v. NLRB, 321 U.S. 332, 334-39 (1944); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S.

**[continued]**

pretermitted the question, by creating the duty of fair representation to escape grappling with the serious problems of due process and equal protection that exclusive representation raises.[44] And most recently, the Court once again avoided the constitutional issue in construing NLRA § 8(a)(3).[45] So, no historical basis exists for the District Court's ruling.

*b.* As to substantive due process, application of the NLRB's procedureless accretion-doctrine here thwarts the very purpose of the NLRA and exclusive representation. NLRA § 1 sets out the finding of Congress that the absence of collective bargaining "caus[es] diminution of * * * wages" and "depress[es] wage rates". NLRA § 9(a) mandates that exclusive representatives are "designated or selected for the purposes of collective bargaining". This Court recently confirmed that exclusive representatives may charge non-union employees agency fees "only for those activities that *actually benefit* [those employees]".[46] And NLRA § 9(b) requires the NLRB to decide certification-issues so as "to assure to employees the fullest freedom in exercising the rights guaranteed by" the act. These precepts compel the conclusion that an NLRB rule or regulation such as the accretion-doctrine that works to *diminish* petitioners' wages and to cause them other *actual detriment* as a consequence

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342, 346-47 (1944). Neither of these decisions, however, reconsidered the constitutional matters discussed in *Jones & Laughlin* and *Virginian Railway*, although the statutory constructions adopted in those cases predicated their constitutional holdings. *See, e.g.,* Comment, *The Mechanics of Collective Bargaining*, 53 Harv. L. Rev. 745, 789-91 (1940).

[44]Steele v. Louisville & N.R.R., 323 U.S. 192, 198 (1944). *See* Vaca v. Sipes, 386 U.S. 171, 182 (1967). *See generally, e.g.,* Weyland, *Majority Rule in Collective Bargaining*, 45 Colum. L. Rev. 556, 568-69 (1945).

[45]Communications Workers v. Beck, 487 U.S. 735, 761-63 (opinion of the Court), 763 n.1 (opinion of Blackmun, J., dissenting) (1988) (resolution of First-Amendment issue unnecessary to decision).

[46]*Id.* at 760 (emphasis supplied).

of their involuntary inclusion in a bargaining-unit is *ipso facto* violative of the NLRA, and therefore beyond the power of the NLRB to promulgate or implement at all, whatever its strictly procedural demerits.

*Third,* this Court has upheld the exercise of original jurisdiction by the District Courts in actions analogous to the instant one.[47] And at least one Circuit Court has, too.[48]

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[47] *See* Leedom v. Kyne, 358 U.S. 184, 188-89 (1958). That *Leedom* involved a specific prohibition in the NLRA, as opposed to a specific command, is immaterial. In sufficiently important instances, the *Leedom* rule applies even if no explicit statutory mandate can be cited. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 16-17 (1963). Revealingly, the District Court never mentioned *Leedom*.

[48] Fay v. Douds, 172 F.2d 720 (2d Cir. 1949). In *Fay*, a union challenged an NLRA § 9(a) certification-proceeding on the ground that it

> ha[d] a "property" right in the maintenance of its position as exclusive bargaining agent, and that this was substantially invaded by the [NLRB's] denying its privilege of a hearing upon [the NLRB's] "investigation," preparatory to deciding whether an election should be called.

The court held that the union's

> contention is not so plainly untenable that the District Court might not proceed to decide the other issues involved. The [union's] interest in remaining the exclusive bargaining agent was of great importance to it, and to dispense with the "investigation" on the outcome of which depended the calling of an election, would imperil its position, even though it could not be "certified" upon an election. To do this without any hearing can plausibly be thought to be a denial of due process of law.

172 F.2d at 723. Here, petitioners have no mere "interest" in remaining free of an NLRA § 9(a) representative, but pre-existing *constitutional* "liberty" and "property" rights recognized in this Court's precedents. If, *arguendo*, Congress may constitutionally nullify these rights through a scheme of exclusive representa-

**[continued]**

*Fourth*, petitioners' claims are anything but "insubstantial or frivolous",[49] or "so attenuated * * * as to be absolutely devoid of merit".[50] This is not a case in which petitioners' complaint "lacks an arguable basis either in law or in fact" or "describ[es] fantastic or delusional scenarios";[51] in which none of petitioners' "legal points [are] arguable on their merits";[52] in which the issues petitioners raise require no "analysis and exposition for [their] decision" and are "so wanting in substance as not to need further argument";[53] or in which the "unsoundness" of petitioners' claims "so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question[s] sought to be raised can be the subject of controversy".[54] To the contrary: The merest contrast between the NLRB's brazen admission that its accretion-

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tion that employs appropriate procedural due process, to override these constitutional rights "without any hearing can plausibly be thought to be a denial of due process".

[49]Bell, 327 U.S. at 683.

[50]Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904), *quoted as the standard in* Baker v. Carr, 369 U.S. 186, 199 (1962), and Hagans v. Levine, 415 U.S. 528, 536-37 (1974).

[51]Neitzke v. Williams, ___ U.S. ___, ___, ___, 109 S. Ct. 1827, 1831, 1833 (1989).

[52]Anders v. California, 386 U.S. 738, 744 (1967).

[53]Milheim v. Moffat Tunnel Improvement Dist., 262 U.S. 710, 716-17 (1923).

[54]*Ex parte* Poresky, 290 U.S. 30, 32 (1933), *quoted in* Goosby v. Osser, 409 U.S. 512, 518 (1973), *and* Hagans, 415 U.S. at 537-38. *Accord, e.g.,* Oneida Indian Nation of New York State v. County of Oneida, New York, 414 U.S. 661, 666-67 (1974); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 68-72 (1978).

doctrine "is unfair to everyone"[55] and the precept that "[f]airness of procedure is 'due process in the primary sense' "[56] exposes the crudely procedureless character of the accretion-doctrine as peculiarly arbitrary and atavistic,[57] and renders frivolous the notion that that doctrine (as the NLRB has applied it here) raises no serious, judicially cognizable issues of statutory construction and procedural due process.

Moreover, no substantial reason exists to believe that the NLRA, the Constitution, or the previous decisions of this Court sanction what the NLRB has done. Quite the opposite: *Consolidated Edison Co.* v. *NLRB*[58] early answered the question of whether notice and hearing were simply dispensable in NLRB proceedings. At issue was whether the NLRB could invalidate certain contracts between an employer and one union in the course of an unfair-labor-practice proceeding brought against the employer by a second union, with respect to which proceeding the NLRB had given the first union neither notice nor an opportunity to be heard. To the NLRB's argument that the first union was not an indispensable party, the Court responded that, "having valuable and beneficial interests in the contracts", the union was "entitled to notice and hearing before they

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[55] *Ante*, p. 6.

[56] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring).

[57] *See, e.g.*, the typical language from *Mullane*, 339 U.S. at 314: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." In practice, an accretion-decision is clearly one "which is to be accorded finality", in that direct judicial review is entirely foreclosed, and indirect review possible (if at all) only upon a finding by the NLRB of an unfair labor practice in a separate proceeding. *See* NLRA §§ 9(d), 10(c, e & f).

[58] 305 U.S. 197 (1938).

could be set aside". Citing numerous precedents, the Court concluded that "[t]he rule, which was applied in the cases cited to suits in equity, is not of a technical character but rests upon *the plainest principle of justice*, equally applicable here".[59] To the contention of the NLRB that NLRA § 10(b) "authorizes the [NLRB] to serve a complaint only upon persons charged with unfair labor practices", the Court rejoined that, "[i]n that view, the question would at once arise whether the [NLRA] could be construed as authorizing the [NLRB] to invalidate the contracts of independent labor unions not before it and also as to the validity of the [NLRA] if so construed".[60]

Self-evidently, the reasoning of *Consolidated Edison* controls here. Through the accretion, the NLRB destroyed petitioners' "liberty" and "property", including their right to contract autonomously for employment and the "valuable and beneficial interests" they already had in their wages, other compensation, and working conditions. The NLRB admittedly denied them notice of and hearing on the accretion. On its face, this course of action offends "the plainest principle of justice", and raises serious questions as to the proper construction of NLRA §§ 9 and 10 or as to the constitutional validity of those sections as the NLRB construes them.

Thus, *Consolidated Edison* alone establishes beyond cavil that petitioners' case is anything but frivolous or insubstantial.

*Fifth and last*, far from illustrating that petitioners' claims are frivolous, the District Court's opinion exhibits mere question-begging posing as reasoning.

*a.* The court dilated on how exclusive representation under NLRA § 9(a) "qualifies", "restrains", or even "extinguishes" the

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[59] *Id.* at 233 (emphasis supplied).

[60] *Id.*

rights of individual employees.[61] Were this true *after* the relationship of exclusive representation has been established, it would not control what procedures are requisite to create that relationship *initially*. Reflecting the intent of Congress to promote for employees *both* "the right to self-organization" *and* "the right to refrain from * * * such activities",[62] the NLRA prescribes an elaborate procedure culminating in "an election by secret ballot"[63] — certainly satisfying in a formal sense the due-process requirements of notice and hearing for all employees in the bargaining unit. In its accretion-doctrine, conversely, the NLRB substitutes for an election the *imposition* of a representative upon some employees without their consent, without their participation, and even without their knowledge of what is going on (until it is too late). This is the antinomy petitioners' complaint addresses — a contradiction not dispelled by airy references to the powers of an exclusive representative designated according to proper procedures.

*b.* In its rush to declare that petitioners have no *constitutional* rights in the premises, the District Court neglected to ask whether they may have a *statutory* right that the NLRB has neglected. Given the admonition that courts should construe the NLRA not only in a constitutional fashion[64] but also so as to avoid unnecessary constitutional decisions,[65] the court should first have examined NLRA § 9 itself to determine whether the statute already contains the solution to the problem petitioners pose. Had it done so, it would have found the congressional command that, in certification-cases, the NLRB "*shall* provide for

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[61] App. at 6a-7a.

[62] NLRA § 7.

[63] NLRA § 9(c)(1).

[64] Jones & Laughlin Steel Corp., 301 U.S. at 30.

[65] NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501 (opinion of the Court), 508-11 (opinion of Brennan, J., dissenting) (1979).

an *appropriate* hearing upon due notice".[66] This should be enough. For, in as much as

- the accretion-doctrine is itself an accretion by administrative rule upon the NLRB's statutory powers under NLRA § 9;

- no administrative rule may contravene or exceed a legislative grant of authority to the agency promulgating the rule;[67]

- the only material legislative grant of authority to the NLRB mandates that the latter "*shall* provide for an *appropriate* hearing upon due notice"; and,

- consistently with "the plainest principle of justice", an "appropriate hearing" should include precisely those employees whose rights may be compromised by an accretion-decision,

common sense should dictate, not merely the substantiality of petitioners' claims, but their unanswerability.

*c.* By ruling that petitioners may be compelled to accept Local 199 as their exclusive representative — without an election, without rudimentary notice and hearing, without judicial review or recourse, but with a significant loss of property in terms of their compensation and quality of working conditions — the District Court begged a vital question: whether the NLRA may constitutionally require nonunion employees to sacrifice *individual* employment-benefits in order to enhance the union's *institutional* power.

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[66] NLRA § 9(c)(1) (emphasis supplied).

[67] *E.g.*, Brannan v. Stark, 342 U.S. 451 (1952).

The lowest level of constitutional scrutiny of legislative enactments is the so-called "rational-basis test". What is the unique rational basis this Court has accepted for all compulsory-unionism laws? That compulsory unionism provides *actual benefits* for all the employees represented, whether union or nonunion.[68] If the decision of the District Court is sustained in its ultimate significance — namely, that the courts lack jurisdiction to prevent the NLRB from administratively shanghaiing unwilling employees into a bargaining-unit in which they immediately suffer *actual detriment* from exclusive representation — , then NLRA § 9(a) must be *pro tanto* unconstitutional for lack of a rational basis. This extreme consequence alone condemns the carelessness with which the District Court glossed over the issues in this case.[69]

## II. Because dismissal of petitioners' complaint against Local 199 gratuitously excuses the union's violation of its duty of fair representation, the dismissal throws into serious doubt the NLRA's scheme of exclusive representation as applied in accretion-cases.

Perhaps wisely, the District Court offered no reasons, howsoever faulty, for its *sub silentio* dismissal of petitioners' complaint against Local 199. For none there are.

*A. The failure of Local 199 to seek dismissal.* Unlike the NLRB, Local 199 made *no* motion under Rule 12(b)(1) or any other section of Rule 12. And even if it had, *Local 199* could have no relief on the precedents the District Court misapplied

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[68] This appears most clearly in cases in which this Court has upheld compulsory agency fees. *See* Railway Employes' Dep't v. Hanson, 351 U.S. 225, 238 (1956); Machinists v. Street, 367 U.S. 740, 761 (1961); NLRB v. General Motors Corp., 373 U.S. 734, 740 (1963); Beck, 487 U.S. at 760.

[69] *Contrast* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) (jurisdiction asserted, and judicial remedy created, to avoid having to pass on the unconstitutionality of exclusive representation under the Railway Labor Act).

that concerned supposed jurisdictional limitations on court review of decisions of *the NLRB*.[70] Petitioners' claims against the NLRB and Local 199 are *separate and independent*. If Local 199 violated its duty of fair representation by not giving petitioners notice of the pendency of the accretion-proceeding (as explained below), Local 199 is liable even if the NLRB perhaps had no duty to provide petitioners with notice. For that reason, dismissal of the complaint against the NLRB did not automatically entail dismissal of the complaint against Local 199.

*B. The substantiality of petitioners' claim against Local 199.* Petitioners' claim against Local 199 *is* one of first impression: namely,

> "Where a union purports to act on the behalf of nonunion employees as their exclusive representative in fact, and as the entity entitled to recognition in law as those employees' representative under NLRA § 9(a), does the union's assertion of that status trigger the duty of fair representation as to its acts in reliance on or furtherance of that assertion?"

But petitioners submit that even if the answer to this question might be debatable, the substantiality of the issue is not, for three reasons.

- The premiss of the accretion-doctrine is that a unit-*clarification* by the NLRB is warranted because the employees to be accreted into the pre-existing unit have *already* become, as a matter of fact and law, members thereof.

- The first logical corollary of this premiss is that the union theretofore certified as the exclusive representative for that unit (and therefore the exclusive representative for *some* employees) is *already*, as a matter of fact and law, the exclusive representative for the employees to be accreted.

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[70] *See* App. at 4a-5a.

> • The second logical corollary, then, is that that union, because it claims to be the rightful NLRA § 9(a) exclusive representative of those employees, *already* owes them a duty of fair representation with respect to all actions it allegedly takes on their behalf in its representational capacity. And one aspect of this duty is *procedural* in nature: The union "is required to * * * give [nonunion employees] notice of and opportunity for hearing upon its proposed action[s]".[71]

Here, Local 199 itself had notice of and opportunity to participate in the NLRB's accretion-proceeding. It knew that petitioners had no such notice or opportunity. It also knew that the proceeding threatened petitioners' "valuable and beneficial interests" in their individual contracts of employment. And it knew, or should have known, that participation by itself (as the agent of its voluntary members) without notice to petitioners (with whom it had a definite conflict of interest at the basic level of representation) was: (i) *arbitrary*, in that Local 199 could have no justifiable reason for withholding notice of the pendency of the accretion-proceeding; (ii) *discriminatory*, in that its silence promoted its own institutional interests and the interests of its voluntary members over the interests of petitioners;[72] and (iii) arguably *in bad faith*. That is more than enough to make out a serious claim of Local 199's breach of its duty of fair representation.

*C. The constitutional consequences of an absence of court jurisdiction over petitioners' claim against Local 199.* If this claim is not cognizable in the courts, intractable constitutional problems arise.

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[71]Steele, 323 U.S. at 204.

[72]This is the sort of discrimination that requires no specific proof of intent. *See* Radio Officers' Union v. NLRB, 347 U.S. 17, 44-52 (1954).

In *Steele*, this Court created the duty of fair representation and clothed the courts with jurisdiction to enforce that duty, precisely in order to avoid having to decide the unconstitutionality of exclusive representation.[73] However, avoidance of this difficult issue remains contingent upon the continued vigilant assertion by the courts of jurisdiction to hear duty-of-fair representation cases. For *Steele* warned that

> [i]n the absence of any available administrative remedy, the right * * * to a remedy for breach of the statutory duty [of fair representation] is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction.[74]

In this case, if the District Court lacks jurisdiction over *both* the NLRB *and* Local 199, petitioners would have *no* relief. For even if they could make out an unfair-labor-practice charge of some kind *in futuro*, the NLRB's General Counsel claims

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[73] 323 U.S. at 198-99, 203. Although *Steele* construed the provision of the Railway Labor Act establishing exclusive representation, the Court referred to NLRA § 9(a) and cited NLRA judicial precedents and legislative history as authority. *Id.* at 200, 202 n.3, *citing inter alia* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944), *and* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944), *along with* Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) (a Railway Labor Act case that relied on *J.I. Case* as authority). This equation of the two labor acts is hardly surprising, exclusive representation having been held identical under each seven years earlier. Jones & Laughlin Steel Corp., 301 U.S. at 44-45, *citing* Virginian Ry., 300 U.S. at 548-49. Thus expectable was the Court's immediate extension of the duty of fair representation to the NLRA, and its consistent explanation thereafter that *Steele* was the common source of the duty under both statutes. *See* Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330, 336-38 (1953), *origin explained in* Vaca v. Sipes, 386 U.S. 171, 177 (1967).

[74] 323 U.S. at 207.

"unreviewable discretion" to refuse to issue a complaint.[75] Thus, in this and all other accretion-cases in which both the NLRB and the courts would be unwilling or unable to remedy a union's breach of its duty of fair representation, "the basic purposes underlying th[at] duty" would be "frustrate[d]".[76] But, were these "basic purposes" "frustrate[d]" (or the duty "sacrificed or obliterated", as *Steele* warned), the constitutionality of the imposition of exclusive representation through the accretion-doctrine would be squarely and unavoidably at issue.

In sum, the District Court's *sub silentio* dismissal of petitioners' complaint, and the Circuit Court's *per curiam* affirmance of that dismissal, strikes at the very heart of the *Steele* doctrine and raises profound statutory and constitutional issues that this Court must, because only it can, answer.

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[75]NLRB v. Local 23, Food Workers, ___ U.S. ___, ___, 108 S. Ct. 413, 420 (1987) (*dicta*).

[76]Vaca, 386 U.S. at 182-83.

## CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

HUGH L. REILLY
National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

EDWIN VIEIRA, JR.,
*Counsel of Record*
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

*Attorneys for Petitioners*

# APPENDICES

# APPENDIX A

## JUDGMENT OF THE COURT OF APPEALS

**28 June 1990**

DO NOT PUBLISH

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3662

D.C. Docket No. 88-00143-CIV-FtM-10C

DAVID O. CONGER, LEONARD H. ALSENE, THOMAS S. HODGES, PATRICK R. LEON, DENNIS PFROMMER, STARLING ROBERTS, JR., DOMINIC M. SKINNER, JOHN TODD and CHRIS YOUNG,

Plaintiffs-Appellants,

versus

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199 THE NATIONAL LABOR RELATIONS BOARD,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(June 28, 1990)

Before HATCHETT and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.

**PER CURIAM: AFFIRMED. See 11th Cir.R. 36-1.**

"Costs taxed against plaintiffs-appellants."

Judgment Entered: June 28, 1990
For the Court: Miguel J. Cortez, Clerk

By: David Maland
Deputy Clerk

ISSUED AS MANDATE: JUL 23 1990

# APPENDIX B

## ORDER OF THE DISTRICT COURT

## 3 July 1989

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

DAVID O. CONGER, LEONARD H. ALSENE, THOMAS S. HODGES, et al.,

Plaintiffs,

-vs- CASE NO. 88-143 Civ-FtM-10(C)

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, OLC,

and

NATIONAL LABOR RELATIONS BOARD,

Defendants.

_____/

**ORDER**

This action is brought pursuant to 28 USC § 2201 seeking declaratory relief for alleged violations by the National Labor Relations Board ("NLRB" or the "Board") and the International Brotherhood of Electrical Workers, Local 199 ("IBEW" or "Union") of the plaintiffs' constitutional rights and rights accorded them under the National Labor Relations Act, 29 USC §157, 159. Before the Court are motions filed by the defendants.

Plaintiffs are a group of eight technical employees and one warehouseman, termed "business technicians," recently employed by a subsidiary of United Telephone Company of Florida ("UTC"). The subsidiary was disbanded, and UTC filed a petition with the NLRB pursuant to 29 CFR §102.60(b) to clarify whether the existing union bargaining unit at UTC should absorb

the nine [2]business technicians who were previously unrepresented by a collective bargaining agent. After a hearing on the petition at which both the Union and UTC were represented, the NLRB determined that the business technicians did not constitute a separate unit and that they should be included, i.e., accreted, within the Union's bargaining unit.[1] The business technicians do not wish to be included in the certified bargaining unit and claim that they received no notice of the NLRB proceedings.

The NLRB moves to dismiss the complaint on the ground that the Court does not have jurisdiction and that the complaint fails to state a claim against the NLRB. The jurisdictional issue will be addressed first.

The NLRB has "broad discretion" in determining what constitutes an appropriate bargaining unit. NLRB v. Magna Corp., [3]734 F.2d 1057, 1061 (5th Cir. 1985).[2] Its authority to

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[1]"An accretion is the addition of a relatively small group of employees to an existing bargaining unit where these additional employees share a sufficient community of interest with unit employees and have no separate identity. The additional employees are then absorbed into the existing unit without first having an election and are governed by the unit's choice of bargaining representative." Consolidated Papers Inc. v. NLRB, 670 F.2d 754, 756-57 (7th Cir. 1982).

It should be noted that although a hearing may be held to address a unit clarification petition, a hearing is not required. Indeed, "the regional director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing . . . " 29 C.F.R. 102.63(b). In this case a hearing was held and it was determined that the nine business technicians should be accreted into the existing bargaining unit of approximately 1275 employees in large part because the "business technicians and the warehouse attendant perform work similar, and in many cases identical, to that performed by employees in the established bargaining unit." The hearing examiner found great similarities between the business technicians and the unionized communications technicians. See NLRB report, Exhibit "A" to Doc. #2.

[2]Overall, the Board has broad authority to prescribe "such rules and regulations as may be necessary to carry out the provisions of this subchapter." 29 U.S.C. §156.

determine the appropriate scope of a bargaining unit and whether a group of employees should be accreted into that unit is clearly recognized. Id. see also NLRB v. Sunset House., 415 F.2d 545 (9th Cir. 1969) (Board to decide the scope of bargaining unit once its it is called into question); Westinghouse Corp. v. NLRB, 440 F.2d 7 (2nd Cir. 1971) (Board has authority to include new employees into unit without holding an election).[3] A Court may not normally review a NLRB decision concerning union representation except where it forms the basis of a final order issued in an unfair labor practice proceeding. AFL v. NLRB, 308 U.S. 401 (1940).[4] In this case, neither UTC nor the Union challenged the NLRB decision accreting the business technicians. Absent some exceptional circumstance, therefore, plaintiffs' claim against the NLRB should be dismissed for lack of subject matter jurisdiction.

Plaintiffs try to avoid the jurisdictional limitation by asserting that their constitutional rights to due process and [4]free association have been violated. In Fay v. Douds, 172 F.2d 720, (2d Cir. 1949) the Second Circuit recognized jurisdiction involving an issue of labor representation where the plaintiff asserted a constitutional violation that was not "transparently frivolous." Specifically, the Court found jurisdiction when the union asserted that it had a property right in being an exclusive bargaining agent, and that the Board invaded that right by "denying its privilege of a hearing upon the "investigation" preparatory to deciding whether an election should be called." Id. at 723. Here, plaintiffs argue that the Board's failure to provide them with

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[3]29 U.S.C. §159(b) provides in part: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of the collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . "

[4]Indeed, the Fifth Circuit has held: "Direct review of unit clarification determinations is unavailable. The employer must refuse to bargain and then raise the issue in a subsequent unfair labor practice proceeding." NLRB v. Magna, supra, at 1059.

notice of the unit clarification hearing violated their right to due process and deprived them of a property right in that the Board's action "as a practical matter, has reduced the compensation, benefits, and working conditions of business technicians . . . to those of communications technicians, represented by defendant Union." Furthermore, by accreting them into the existing bargaining unit, plaintiffs assert that the rights accorded them by 29 USC §§ 157, 159 and the first amendment to refrain from compulsory unionization has been violated.

The Plaintiffs' contention that the Union's representation abridges their First Amendment right of freedom of association is meritless. Section 7 of the Labor Act provides, in pertinent part, that all employees shall have the right either to "join . . . labor organizations" or to "refrain from . . . such activities." The Board's decision does not require the [5]Plaintiffs to join the Union. The rights guaranteed by Section 7 are not unqualified, and one well-recognized limitation results from the principle of exclusive representation embodies in Section (a) of the Labor Act. See, Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 61-70 (1975); NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216, 218-221 (9th Cir. 1969). For under Section 9(a), the representative selected by a majority of the employees in an appropriate bargaining unit represents all the employees in the unit, including that minority of the employees who did not choose to be represented by it and who would prefer to exercise their Section 7 right to refrain from being represented by it.

Moreover, the principle of exclusive representation "extinguishes the individual employee's power to order his own relations with his employer" and "only the union may contract the employee's terms and conditions of employment[.]" NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 180 (1967). This principle was designed to serve the cause of "orderly collective bargaining" (Medo Photo Corp. v. NLRB, 321 U.S. 678, 685 (1944)) and comports with the Labor Act's declared policy of promoting industrial peace by encouraging the collective bargaining process. See, Section 1 of the Labor Act.

The Supreme Court recognized that the restraints imposed on individual rights under the principle of exclusive representation would be wholly unjustifiable unless the exclusive representation had a reciprocal obligation to fully and fairly represent all the [6]employees. Wallace Corp. v. NLRB, 323 U.S. 248, 255-256 (1944). See also, Vaca v. Sipes, 386 U.S. 171, 177 (1967). The duty of fair representation was conceived as a protection for employees faced with the reduction of their individual rights corresponding with the grant of power to unions to act as their exclusive collective bargaining representative.[5] Vaca v. Sipes, 386 U.S. at 182; NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. at 181. It has served as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." Vaca v. Sipes, 386 U.S. at 182.

In light of the well established principles governing majority rule and the protections given to the minority, it is clear that Plaintiffs' First Amendment allegation must fail. Plaintiffs' First Amendment allegation ignores the principle that federal labor laws seek to promote industrial peace through a "system of employee organization and collective bargaining . . . [and that] [t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective [7]interests of all employees in a bargaining unit." Vaca v. Sipes, 386 U.S. 171, 182 (1967). "Congress gave to a union selected by a majority in an appropriate unit the right to obtain recognition for the entire unit

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[5]In conformity with this general principle, the Board has held, with court approval, that Section 8(b)(1)(A) of the Labor Act imposes upon the obligation to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. at 177-178. Section 8(b)(1)(A) of the Labor Act makes it an unfair labor practice for a labor organization to "restrain or coerce employees in the exercise of the rights guaranteed in Section 7."

including a non-consenting minority." NLRB v. Appelton Electric Co., 296 F.2d 202, 206 (7th Cir. 1961).

As Plaintiffs' First Amendment allegation fails so must their Fifth Amendment claim. Contrary to Plaintiffs' assertion, their right to due process has not been violated because they have no recognized property or liberty interest which has been invaded by the Board's decision.

It follows that the Court lacks subject matter jurisdiction and this case must be and is hereby DISMISSED for that reason. All other pending motions are moot.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 3rd day of July, 1989.

/s/
UNITED STATES DISTRICT JUDGE

# APPENDIX C

## NATIONAL LABOR RELATIONS BOARD DECISION AND CLARIFICATION OF BARGAINING UNIT

**11 February 1988**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

UNITED TELEPHONE COMPANY
OF FLORIDA

Employer/Petitioner

and Case 12-UC-75

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 199,
AFL-CIO, CLC

Union

## DECISION AND CLARIFICATION OF BARGAINING UNIT

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[1] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer, United Telephone Company of Florida (sometimes referred to herein as "UTF") is engaged in commerce

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[1]The briefs of the parties have been carefully considered.

within the meaning of [2]the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[2]

3. The International Brotherhood of Electrical Workers, Local 199, AFL-CIO, CLC (referred to herein as the "Union" or the "IBEW) is a labor organization within the meaning of the Act.

4. The Employer filed the petition herein seeking a determination as to whether or not approximately nine business technicians and one warehouse attendant in the South Division of its Business Services Division (herein called "BSD") constitute an accretion to an existing bargaining unit of approximately 1275 employees represented by the Union. The Employer takes the position that the 10 employees are not an accretion to the existing unit. The Union contends that the Employer has violated Section 8(a)(5) and (1) of the Act by its conduct with respect to the business technicians and warehouse attendant, as alleged in an unfair labor practice charge, and that the petition herein should be dismissed while the processing of the charge should proceed. The Union alternatively contends that the business technicians and warehouse attendant constitute an accretion to the existing unit.

As noted already herein, the Employer is a telephone operating company which provides local and long distance telephone service in various parts of the State of Florida. The Employer has eight districts within its [3]Florida operation, and the eight districts comprise two divisions, a North Division and a

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[2]The Employer, a Florida corporation with its corporate headquarters located in the Altamonte Springs, Florida area, is engaged in the business of providing local and long-distance telephone service to customers in a number of counties in the State of Florida. During the 12-month period immediately preceding the commencement of the hearing in this case, the Employer, in the course and conduct of its business operations, derived gross revenues in excess of $500,000, and during that same period of time purchased and received at its Florida facilities products, goods, and materials valued in excess of $50,000 directly from points outside the State of Florida.

South Division. The geographic territory covered by the eight districts is the territory for which the Florida Public Service Commission (herein called the "FPSC") has granted the Employer an exclusive franchise to provide local exchange services.

The Employer as it exists today resulted from the merger in 1983 of three local telephone companies: what was then UTF (the current South Division of the Employer), Winter Park Telephone Company, and Florida Telephone Corporation. Before and after the merger, employees in the South Division have been represented by the IBEW,[3] and former employees of Florida Telephone Corporation (the current Ocala, Leesburg and Winter Garden districts of the North Division) have been represented by the Communications Workers of America (herein called the "CWA"). The Employer and the IBEW are parties to a current collective bargaining agreement, which went into effect in August 1986, and will expire in July 1989.[4] Employees of what was formerly the Winter Park Telephone Company (currently the Winter Park district of the North Division) have not been represented by a labor organization before or after the merger.

Historically, all aspects of telephone service, including customer premises equipment (herein called "CPE"), inside wiring, and access lines between customers and telephone company switching centers, were provided by local exchange telephone companies. A telephone company was granted a monopoly to provide this "end to end" service in its franchised territory, and in return the company was regulated by both state and federal government [4]agencies. However, in recent years, various aspects of the telephone industry have been deregulated.

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[3]The unit represented by the IBEW is a broad one, encompassing approximately 27 job classifications, including, inter alia, various technicians, mechanics, clerks, operators, and warehouse attendants.

[4]Also, the Employer apparently has a current collective bargaining agreement with the CWA.

One aspect of the telephone industry that has been subject to changes in regulatory policy is CPE. In 1980, the Federal Communications Commission (herein called the "FCC") ruled that as of January 1, 1983, local exchange telephone companies could not purchase any new CPE (or terminal equipment) for lease or sale (except, apparently, on a non-tariffed, non-regulated basis). In 1982, the FPSC ruled that beginning January 1, 1983, local exchange telephone companies in Florida could no longer provide (lease or sell) or maintain new CPE except though a "fully separated affiliate, utilizing separate facilities, personnel and records of account." From that point on, a local exchange telephone company could only provide and maintain the CPE it had on hand before January 1, 1983; that CPE became known as the Company's "embedded base."

Prior to January 1, 1983, the Employer provided CPE to business and other customers on a leased basis and maintained it. Beginning January 1, 1983, the Employer could not lease, sell, or maintain CPE, except that in its embedded base. Beginning sometime prior to January 1, 1983, and continuing until late 1983 or early 1984, another related company, Utelcom,[5] was selling business terminal equipment as well as maintaining it.

After Utelcom was disbanded in late 1983 or early 1984, the Employer formed, in March of 1984, a separate subsidiary, United Telephone Communications Systems, Inc. (herein called "UTCSI") to sell and maintain business terminal equipment.[6] At the time it was formed, UTCSI assumed the maintenance contracts and warranty obligations of Utelcom. Also in 1984 [5]when UTCSI was created, 3212 business accounts were transferred

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[5]Utelcom and UTF shared the same parent corporation, United Telecommunications, Incorporated.

[6]Neither employees of Utelcom nor employees of UTCSI were represented by a labor organization.

from the Employer to UTCSI.[7] From 1984 until 1987, approximately 500 more accounts were transferred from the Employer to UTCSI. UTCSI's original complement of technicians (who were later to be called "business technicians") apparently consisted of a number of employees who until then had been employed by UTF in the IBEW bargaining unit, one employee whose most recent previous employer had been Utelcom (but who had before then worked for UTF), and possibly a couple of others.

In 1986, the Employer obtained a waiver from the FPSC of its requirement of a separate subsidiary to provide and maintain new CPE. Then, believing that it made better business sense to bring the work back into UTF, the Employer in 1987 disbanded UTCSI and replaced it, effective July 1, 1987, with the BSD. The BSD's original complement of seven business technicians and one warehouse attendant all came from UTCSI; prior to their terms of employment with UTCSI, all seven business technicians had been bargaining unit employees of UTF in the IBEW unit, with one having had an intervening position with Utelcom. Subsequently, two additional business technicians were hired who had no previous affiliation with UTSCI or UTF.

As of December 31, 1987, the provision and maintenance of CPE was further "deregulated" and local operating companies were no longer allowed to maintain expenses associated with CPE on their regulated, intrastate books. Employer witnesses testified at the hearing that they planned to transfer accounts from the "regulated side" of UTF to the BSD after the [6]deregulation of December 31, 1987.[8] An Employer witness further testified that the initial accounts he expected to be transferred were ones

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[7]In connection with the transfers, customers bought their CPE, which they had previously leased from the Employer. Following the sales, UTCSI took over the maintenance work.

[8]Transfers of work to the BSD (and away from IBEW bargaining unit employees) are not mandated by deregulation. However, separate "books" must be maintained for the regulated versus deregulated work.

viewed by the Employer as "high visibility" accounts; he estimated that 50 to 75 PBX accounts and 700 to 1000 key systems[9] would be transferred from the regulated side to the BSD after December 31, 1987. With the transfer of the "high visibility" accounts, the Employer was to begin implementing its plan to ultimately have all business accounts handled by the BSD.[10]

Prior to establishing the BSD, the Employer initiated discussions with the IBEW and CWA concerning its plans to establish the BSD. The Employer and the CWA agreed that the former UTCSI technicians in all districts of the North Division except Winter Park should be included in the existing CWA bargaining unit in a new "business technician" classification, and agreed to terms and conditions of employment for the business technicians.[11] Negotiations between the Employer and the IBEW resulted in an apparent stalemate on the issue of seniority for the business technicians. The Employer thereafter refused to extend recognition to the IBEW as the representative of the business technicians and warehouse attendant in the South Division. Since July 1, 1987, the Employer has [7]treated business technicians and the warehouse attendant in the South Division as unrepresented employees.

As indicated above, the BSD sells, installs and maintains CPE for business customers, and business technicians are the

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[9]Key equipment allows a customer the option of having access lines terminating at its business; a number of telephone sets, with lighted keys or buttons are then extended from those lines. PBX systems are larger and provide switching services on the customer's premises, allowing for calling between desks at the particular business.

[10]Since the hearing in this case was completed prior to December 31, 1987, the record does not reflect which accounts, if any, have actually been transferred, beginning January 1, 1988.

[11]Charges against the Employer and the CWA are pending in the investigative stage in this Region, raising the issue of whether the inclusion of business technicians in the CWA unit was lawful.

employees within the BSD who perform the installation and repair of that equipment.[12] On the regulated side of UTF, approximately 50 communications technicians perform the repair, and moves, adds, and changes of CPE for business customers in the South Division.[13] Some of the equipment sold, installed, and maintained by the BSD is the same as that in the regulated side's embedded base.[14] However, because no new CPE was added (or could be added) to the embedded base from December 31, 1982, until December 31, 1987, the CPE dealt with by the BSD includes newer, more advanced equipment than that dealt with by communications technicians. The newer equipment tends to be more computer (digital) based, providing more functions and features to the customer than was available previously. While the communications technicians have in the past serviced equipment only in the areas in which the Employer was franchised by the FPSC, the BSD has not been so limited, and has been able to provide services beyond the franchise boundaries.[15]

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[12]However, installations are largely handled by outside contractors, who business technicians may be called upon to assist and/or oversee. Business technicians also perform "moves, adds, and changes" which apparently involve the same or many of the same skills as initial installations.

[13]Prior to January 1, 1988, the CPE worked on by the unit communications technicians was equipment in the embedded base leased to customers by UTF, and the CPE worked on by the BSD (and UTCSI before it) was customer-owned equipment or equipment leased to the customer by an entity other than UTCSI or UTF.

[14]In the 6 months immediately preceding the hearing in this case, less than half the accounts serviced by the BSD were accounts with equipment unique to the BSD.

[15]In view of the further deregulation of CPE as of December 31, 1987, it appears that this geographical limitation on where communications technicians work would no longer apply.

[8]Employer witnesses estimated that most business technicians spend 75 to more than 95 percent of their time doing repair work. They maintain the key and PBX area equipment and customer cable; their work stops at the demarcation point which separates the customer's equipment and UTF's lines. Additional duties of business technicians may include occasionally overseeing installation work performed by outside contractors,[16] visiting jobsites to assist in preparing costs estimates, checking out customer complaints to see if customers should be charged for work, assisting in sales work,[17] and, in emergency situations, directly contacting vendors or manufacturers to order parts that are unavailable in the warehouse. For the most part, it appears that communications technicians do not perform the above-described additional duties. Communications technicians do perform work on access lines, however, which business technicians do not. Business technicians and communications technicians use similar types of tools and equipment, but due to the differences in the work they perform, their tools and equipment vary somewhat, also.

A business technician trainee or communications technician trainee begins with a basic understanding of electricity and the

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[16]The business technician who was classified as lead technician at UTCSI (Dennis Pfrommer) is the primary business technician who has overseen installation work. (In fact, from the time the BSD came into being until the hearing in this case, Pfrommer was apparently the only business technician who had done this.) An Employer witness estimated that Pfrommer spends about 78 to 80 percent of his time overseeing or otherwise assisting in installation work by outside contractors. The business technician in addition to Pfrommer who in the past had most frequently done this work had apparently been spending about 10 percent of his time on installation work. No party has contended that Pfrommer or any other business technician is disqualified from being part of the IBEW bargaining unit by virtue of any special duties. In this regard, the parties specifically stipulated at the hearing, and based on the entire record I so find, that the business technicians are not statutory supervisors.

[17]Business technicians are not the BSD's primary sales force; instead, approximately 18 sales persons are employed in the BSD.

communications [9]field. Training then progresses through the various types of equipment, with different pieces of equipment requiring specific training. In most cases, training for key equipment is conducted at the Employer's own training center in Altamonte Springs, Florida. On the other hand, for the more complex PBX equipment, in most cases training is provided by the equipment manufacturers themselves.[18] When training on a particular piece of equipment is completed, a certificate of training is provided to the employee by either the Employer's training center or the manufacturer. Training is an on-going process, because new products and modifications to existing products continue to be developed. Not all communications technicians are certified or otherwise trained on all equipment serviced by their group, nor are all business technicians certified or otherwise trained on all equipment serviced by the BSD. It appears that ordinarily the Employer attempts to send only a technician certified on the particular equipment to work on complex PBX equipment.[19] However, uncertified personnel are sent out on occasion, and they may be able to correct the problem.[20]

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[18]Formal training sessions for particular pieces of equipment currently range from about 3 to 15 days. Training sessions conducted by manufacturers are often quite costly.

[19]The trend is for manufacturers of the complex equipment to require that certified technicians do installations, with the penalty for not using certified personnel being voiding of warranties. Also, manufacturers of the complex equipment do not give telephone assistance to technicians unless they are certified; however, the record is not clear as to whether manufacturers otherwise require certified personnel to make repairs.

[20]The various systems have common features (such as the telephones themselves) and the problem may not be in the discrete portion of the system for which training (and certification) is required. In such a case, an uncertified technician could resolve the problem. Also, the uncertified technician might be able to resolve the problem after getting telephone assistance from a certified technician.

[10]Communications technicians and business technicians have separate, immediate supervision.[21] The BSD is a separate administrative division of the Employer, and South Division business technicians currently report directly to the BSD service manager, who is located in Altamonte Springs.[22] Communications technicians, on the other hand, are part of the customer service division, and they report to "service supervisors-complex."

There has been very little in the way of temporary interchange between business technicians and communications technicians since the formation of the BSD. However, the Employer has put into effect, and notified its employees, of a system whereby communications technicians could be called upon to assist the BSD.[23] Likewise, the record reflects no communications technicians who have transferred to business technician positions on a permanent basis, or vice versa, since the BSD became operative. The Employer did post the two business technician positions that it filled after July 1, 1987, for bid by its other employees, and the Employer selected two communications technicians who bid to fill the business technician jobs; however, the employees then decided they did not want the jobs and the Employer subsequently hired the two outsiders.[24]

Wage ranges for communications technicians and business technicians are similar; at the top end of the ranges, communica-

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[21]Of course, in the large IBEW unit, employees in different locales and different classifications also have separate, immediate supervision.

[22]The Employer eventually plans to add an intermediate supervisor for the South Division business technicians.

[23]And business technicians have, since July 1, 1987 done some work on a couple of occasions on the regulated side of the demarcation point.

[24]Furthermore, the Employer has announced plans to "gradually phase in" communications technicians to the BSD, and an Employer witness acknowledged that the communications technician jobs will be "shrinking off and dying" over time.

tions technicians make $13.99 per hour, while business technicians make $14.65 per hour. Benefits, [11]such as health insurance and travel pay, differ; communications technicians are accorded benefits pursuant to the IBEW contract while business technicians are accorded the benefits received by other unrepresented employees of the Employer.

Communications technicians report to work centers each morning. Business technicians, on the other hand, receive their first dispatches of the day at their homes, and then go directly to the areas where the work is to be performed. Communications technicians are assigned company trucks, which they park at the work centers at the end of their shifts. Business technicians have assigned station wagons, which they park at their homes. South Division business technicians live in Ft. Myers and nearby communities. The Employer attempts to assign business technicians to jobs as close to their home locations as possible, but they might be assigned to jobs as far north as Altamonte Springs, which is outside the geographical area covered by the South Division. However, South Division Communications technicians have apparently historically worked only in the South Division.

The regular hours of work for business technicians and communications technicians are apparently 8 a.m. to 5 p.m. Different systems for handling after hours work are in effect for business technicians and communications technicians.

Business technicians are required to wear dress shirts with ties, while communications technicians are not.

The South Division BSD warehouse attendant works at a warehouse in Ft. Myers, Florida, which is separate from the customer service warehouses. Unlike the customer service warehouses, the BSD warehouse is a one-person operation. The BSD warehouse attendant acts as a support person to the business technicians, providing parts and equipment to them; he additionally [12]performs inventory functions, orders parts, prepares purchase orders, and occasionally may drive to another

part of the state to obtain needed parts.[25] The wage range of the BSD warehouse attendant is similar to that of warehouse attendants in the IBEW unit, with the rate at the high end of the range being $11.39 per hour for the BSD warehouse attendant and $11.20 per hour for the customer service warehouse attendants. The benefits of the BSD versus customer service warehouse attendants differ, as do those of all represented versus unrepresented employees. The BSD warehouse attendant reports to the BSD installation supervisor. The record reflects no interchange between the BSD warehouse attendant and employees outside the BSD.

Labor policies for the BSD and the rest of the Employer's operation are set at the Employer's headquarters in Altamonte Springs, Florida. Likewise, accounting and legal functions for the entire company are handled out of the Employer's headquarters in Altamonte Springs.[26]

Based on the foregoing, and the record as a whole, I find that the South Division business technicians and BSD warehouse attendant constitute an accretion to the existing IBEW unit.[27] Business technicians and the warehouse attendant perform work very similar, and in many cases identical, to that performed by employees in the established bargaining unit. Furthermore, some of the very repair work now performed by the BSD was, prior to the creation of UTCSI, originally performed by unit employees, and the Employer now again plans to transfer unit work to the BSD. Terminal [13]equipment worked on by business technicians is part of the integrated telephone system, with the terminal

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[25]The BSD sometimes obtains parts from the customer service division.

[26]Although the record is somewhat sketchy on these points, the Employer acknowledges in its brief, the accuracy of these facts concerning centralized functions.

[27]In so deciding, I am declining the Union's request that I first decide the unfair labor practice issues raised in its charge against the Employer.

equipment eventually hooking up to access lines maintained by employees in the existing unit. Since the establishment of the BSD, business technicians have (although not frequently) worked on the regulated side of the demarcation point, performing work that otherwise would be done by unit employees, and the Employer is actively seeking to fold the communications technician classification into the business technician classification over time. I further note that the business technicians and warehouse attendant constitute a numerically small addition to the existing IBEW unit, and in my view, could not constitute a separate, appropriate unit.[28] In deciding that the approximately 10 BSD employees constitute an accretion, I have considered all the facts, noting that, as is not uncommon, some facts favor a finding of accretion and some do not. See The Great A & P Tea Co. (Family Savings Center), 140 NLRB 1011 (1963). However, despite some factors mitigating against a finding of accretion, I conclude that the record as a whole demonstrates that business technicians and the BSD warehouse attendant are an accretion to the IBEW unit. See Safelite, Division of Lear Siegler, Inc., 277 NLRB 782 (1985); Universal Security Instruments, Inc., 250 NLRB 661 (1980), enforced in pertinent part at 649 F.2d 247, 107 LRRM 2518 (4th Cir. 1981); The Great A & P Tea Co. supra.[29]

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[28]While the employees of the Employer are not as a whole, part of a systemwide unit, I note that a systemwide unit is the optimal unit in the public utility setting. See New England Telephone and Telegraph Co., 280 NLRB No. 16 (1986). Furthermore, in the South Division there exists what is apparently a "wall-to-wall" or nearly "wall-to-wall" unit, and I find no basis for carving out a separate unit of business technicians and the warehouse attendant.

[29]Both parties to this proceeding have requested that I decide whether or not business technicians are, in fact, communications technicians, subject to the provisions of the current collective bargaining agreement specifically relating to communications technicians. While I find that the business technicians are an accretion to the unit, it is nonetheless clear that some of their duties, as well as some of their working conditions, are not the same as, or coextensive with, those of communications technicians. I there-fore find that business technicians are not communications technicians.

[14]ACCORDINGLY, IT IS HEREBY ORDERED that the existing IBEW unit be, and it hereby is, clarified to include the South Division BSD business technicians and warehouse attendant.

DATED at Tampa, Florida, this 11th day of February, 1988.[30]

/s/

Francis E. Dowd, Regional Director
National Labor Relations Board, Region 12
700 Twiggs Street, Suite 511
P.O. Box 172068, Tampa, Florida 33672

[30]Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW, Washington DC 20570. This request must be received by the Board in Washington by February 25th 1988.

# APPENDIX D

## DOCKET IN THE DISTRICT COURT

**District** - 113A
**Off.** - 2
**Docket No.**
Yr. - 88
Number - 00143
**OR** - 1
**Filing Date**
Mo. - 10
Day - 05
Yr. - 88

**J** - 3
**Nature Suit** - 720
**R 23** -
**Judge** - 3A10
**Mag.** - C
**Jury Dem** -
**ARB** -
**MDL Docket** -
**Yr.** - 88
**Docket Number** - 00143

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CAUSE: TITLE 29 SEC. 141 - LABOR/MANAGEMENT RELATIONS ACT

| | PLAINTIFFS | | DEFENDANTS |
|---|---|---|---|
| 1.00 | DAVID CONGER | 10.00 | INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199 |
| 2.00 | LEONARD H. ALSENE | | |
| 3.00 | THOMAS S. HODGES | | |
| 4.00 | PATRICK R. LEON | 11.00 | THE NATIONAL LABOR RELATIONS BOARD |
| 5.00 | DENNIS PFROMMER | | |
| 6.00 | STARLING ROBERTS, JR. | | |
| | | | **APPEALED** |
| 7.00 | DOMINIC M. SKINNER | | |
| 8.00 | JOHN TODD | | **CLOSED** |
| 9.00 | CHRIS YOUNG | | |

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**ATTORNEYS**

**10.00**
**THOMAS J. PILACEK**
PILACEK & COHEN

(1.00-9.00)
**JOHN P. KELLY**
FLEMING, O'BRYAN & FLEMING
P.O. Drawer 7028
Ft. Lauderdale, Floirda 33338
(305) 764-3000

**EDWIN V. VIEIRA**
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

**HUGH L. REILLY**
NATIONAL RIGHT TO WORK LEGAL DEFENSE
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

1516 E. Hillcrest Street
Suite 204
Orlando, FL 32803
(407) 894-1888

**11.00**
**MARGERY E. LIEBER**
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
(202) 634-1729

and

MARGARET DIAZ
700 Twiggs St., Suite 511
Tampa, FL 33602
(813) 228-2669

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IF CASE WAS
FILED IN FORMA PAUPERIS

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FILING FEES PAID

| DATE | RECEIPT NUMBER | C.D. NUMBER |
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| 10/05/88 | #19022 - $120.00 | |
| 08-02-89 | #29888 - $105.00 | |
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STATISTICAL REPORTS PROCESSED

Filing 10/05/88
Termination 07-03-89
Change

[2] Conger v. International Brotherhood
43-CIV-FtM-10C

| DATE | NR | PROCEEDINGS | |
|---|---|---|---|
| 10/05/88 | 1 | **COMPLAINT** - Labor/Management Relations. | rjc |
| 10/05/88 | * | **SUMMONS/CONSENT** issued. | rjc |
| 01-11-89 | 2 | **MOTION** join indispensable party - memo - by deft. International Brotherhood Local 199 | rb |
| 01-11-89 | 3 | **ANSWER** to complaint by deft. Local 199 | rb |
| 01-18-89 | 4 | **MOTION** dismiss complaint by NLRB | rb |
| 01-18-89 | 5 | **MEMO** support of above motion (document #4) | rb |
| 2-13-89 | 6 | **OPPOSITION** to deft. International Brotherhood of Electrical Workers' motion to join indispensable party by plfts. | rb |

Conger v. International Brotherhood
43-CIV-FtM-10C

| DATE | NR | PROCEEDINGS | |
|---|---|---|---|
| 2-13-89 | 7 | **OPPOSITION** to the motion of National Labor Relations Board to dismiss the complaint on jurisdictional grounds by plfts. | rb |
| 07-03-89 | 8 | **ORDER:** it follows that the Court lacks subject matter jurisdiction and that this case must be and is DISMISSED for that reason All other pending motions are moot. s/WTH/07/03/89 (Notified) | rb |
| 8-03-89 | 9 | **NOTICE OF APPEAL** by plft. | rb |
| 08-04-89 | * | **TRANSMITTAL** to USCA | rb |
| 08-30-89 | * | **COURT FILE** to USCA | rb |

# APPENDIX E

## PETITIONERS' COMPLAINT IN THE DISTRICT COURT

**5 October 1988**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

David O. Conger )
4800 Lema Court )
N. Fort Myers, FL 33903 )
)
Leonard H. Alsene )
26014 Ocelot Ln. )
Port Charlotte, FL 33983 )
)
Thomas S. Hodges )
1164 Travis Ave. )
N. Ft. Myers, FL 33903 )
)
Patrick R. Leon )
200 Willoughby Dr. )
Naples, FL 33942 )
)
Dennis Pfrommer )
27605 Suffridge )
Bonita Springs, FL 33923 )
)
Starling Roberts, Jr. )
8862 Fordham Street )
Ft. Myers, FL 33907 )
)
Dominic M. Skinner )
912 NE 10th Terr. )
Cape Coral, FL 33909 )
)
John Todd )
1097 Pompei Ln. )
Naples, FL 33963 )
)
Chris Young )
6745 Winkler Road )
Ft. Myers, FL 33919 )

| | | |
|---|---|---|
| v. | ) | CA No. 88-143-Civ-FTM-10-C |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| International Brotherhood of Electrical Workers, a labor organization, Local 199 2141 Jackson Street Ft. Myers, Florida 33901-3637 | ) | |
| | ) | |
| [2]and | ) | |
| | ) | |
| The National Labor Relations Bd., a federal administrative agency, 1717 Pennsylvania Ave., N.W. Washington, D.C. 20570 | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

COMPLAINT

Parties

The Plaintiffs are employees of the United Telephone Company of Florida (Telephone Company) who are not members of the International Brotherhood of Electrical Workers or of the defendant International Brotherhood of Electrical Workers Local 199 and are employees under § 2(3) of the National Labor Relations Act.

The defendant International Brotherhood of Electrical Workers Local 199 (Union) is a labor organization under § 2(5) of the National Labor Relations Act and has a collective bargaining relationship with the Telephone Company under § 9(a) of the National Labor Relations Act.

The defendant National Labor Relations Board (NLRB or Board) is an administrative agency of the United States created and operating under § 3(a) of the National Labor Relations Act to consider and decide questions concerning labor organization representation of employees of employers under the Act.

[3]Jurisdiction

This Honorable Court has jurisdiction over the claims for relief asserted herein under 28 U.S.C. §§ 1331 and 1337, in that those claims arise and assert questions under:

(1) the First Amendment;
(2) the Fifth Amendment; and
(3) the National Labor Relations Act.

Facts

The nine plaintiffs are employed by the Telephone Company. Eight of them are business technicians; one is a warehouse attendant. All nine plaintiffs were employed by a subsidiary of the Telephone Company until July 1, 1987.

On July 1, 1987, the Telephone Company disbanded the subsidiary as an organization and brought functions performed by the subsidiary within the structure of the Telephone Company itself, creating an internal division to assume the subsidiary's functions and personnel, including the plaintiffs, their positions and functions.

After the subsidiary was disbanded, a question arose as to whether the plaintiffs were represented by the defendant Union for purposes of collective bargaining with their employer, the Telephone Company. The Telephone Company said "no"; the Union said "yes". That question was presented by the Telephone Company to the National Labor Relations Board for resolution in proceedings bearing case no. 12-UC-75 (proceedings).

[4]Both the Telephone Company and defendant Union participated in the proceedings before the Board as parties having notice and the opportunity to be heard at each stage.

The plaintiffs were not, individually or collectively, given notice of the NLRB proceedings or any opportunity to participate and state their positions by either the defendant NLRB or the defendant Union. In those proceedings the NLRB found that "business technicians" such as plaintiffs deal with more advanced "digital" equipment than "communications technicians"; most business technicians have significantly different and additional duties to those of the communications technicians; business technicians and communications technicians have different training; business technicians have immediate supervision separate from communications technicians; business technicians receive first dispatches of the day at home, but communication technicians must first report to work centers; business technicians are assigned company vehicles which they keep at home, but communications technicians are assigned company vehicles which are kept at the work center; the systems for handling work after 5:00 p.m. are different for business technicians and communications technicians; business technicians are subject to a dress code more stringent than the communications technicians; business technicians receive compensation and the work related benefits of employees who represent themselves, but communications technicians receive compensation and work related benefits under the collective bargaining agreement the Telephone Company [5]has with the defendant Union; and that business technicians are not communications technicians. Despite those findings of fact, the NLRB arbitrarily and without rational basis concluded that the plaintiffs "business technicians and warehouse assistant perform work very similar, and in many cases identical, to that performed by employees" in the bargaining unit represented by the defendant Union, and that the business technicians are "accreted" into the bargaining unit represented by the defendant Union. Plaintiffs herein are all the employees in the accreted unit.

As a result of that Board decision the Telephone Company has recognized the defendant Union as the exclusive representative of plaintiffs just as though they defendant Board and the defendant Union had provided the plaintiffs with notice of and the opportunity to participate in the Board proceedings, and just as though the plaintiffs had selected the defendant Union as their collective bargaining representative. Plaintiffs did not have notice of and the opportunity to participate in the Board proceedings and did not select the defendant Union as their collective bargaining representative.

The Telephone Company's recognition of the defendant Union as plaintiff's NLRA § 9(a) representative, without their authority, divests plaintiffs of their right to represent themselves. That action, as a practical matter, has reduced the compensation, benefits, and working conditions of business technicians, such as plaintiffs, to those of communications technicians, represented by the defendant Union. And it forces the plaintiffs to accept [6]the outcome of negotiations between the defendant Telephone Company and defendant Union regarding compensation, benefits, and working conditions, including determinations of issues such as seniority where the conflict of interest between the business technicians and the communications technicians is absolute and irreconcilable.

CLAIM I
(NLRB)

The actions of the Board related above in conducting proceedings without providing plaintiffs with notice and the opportunity to be heard violate plaintiffs' rights to due process under the Fifth Amendment to the United States Constitution.

The actions of the NLRB related above in determining that the plaintiffs are "accreted" into a bargaining unit represented by the defendant Union violates plaintiffs' rights to:

(A) refrain from compulsory unionization under § 7 of the NLRA; and

(B) freedom of association and nonassociation under the First Amendment to the United States Constitution.

Those violations by the NLRB have caused and will cause the plaintiffs monetary damages and injuries not measurable in monetary terms.

[7]CLAIM II
(Union)

The actions of the defendant Union related above in failing to provide plaintiffs with notice of the Board proceedings and in acting as plaintiffs' NLRA § 9(a) representative in those proceedings and in negotiations with the Telephone Company without plaintiffs' authorization, were taken under color of Federal law and violate:

(A) plaintiffs' right to freedom of association and nonassociation under the First Amendment; and

(B) the duty of fair representation the Union owes not to claim to be plaintiffs' NLRA § 9(a) representative pursuant to proceedings which violate due process of law and without plaintiffs' authorization.

Those violations of the defendant Union have caused and will cause the plaintiffs monetary damages and injuries not measurable in monetary terms.

RELIEF

The plaintiffs demand:

1. a declaratory judgment under 28 U.S.C. § 2201 which states;

(a) the proceedings conducted by the Board are void under the Fifth Amendment because the plaintiffs were not

provided notice of and the opportunity meaningfully to participate therein by either the Board or the defendant Union;

[8](b) the defendant Union cannot act as the plaintiffs' exclusive bargaining representative under § 9(a) of the National Labor Relations Act without their authorization under the First Amendment;

(c) the defendant Union cannot act as plaintiffs' exclusive representative under NLRA § 9(a) as a result of proceedings which violate the Fifth Amendment;

(d) the plaintiffs are not required to accept the results of any collective bargaining negotiations between the Telephone Company and the defendant Union under the First and Fifth Amendments.

2. An injunction which requires:

(A) the NLRB to void the Decision Order of February 11, 1988 in case no. 12-UC-75;

(B) the defendant Union to cease acting as plaintiffs' collective bargaining representative and to rescind any and all [9]actions taken by it with regard to plaintiffs based upon invalid claims to § 9(a) status.

3. Damages, costs and attorneys fees from both defendants.

Respectfully submitted,

/s/

John P. Kelly
Fleming, O'Bryan & Fleming
Counsel for Plaintiffs
1415 East Sunrise Blvd.
P.O. Drawer 7028
Ft. Lauderdale, FL 33338
(305) 764-3000

/s/

Edwin V. Vieira
13877 Napa Drive
Independent Hill, VA 22111
(703) 791-6780

/s/

Hugh L. Reilly
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel for Plaintiffs

## APPENDIX F

## MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO DISMISS COMPLAINT IN THE DISTRICT COURT

**13 January 1989**

MARGERY E. LIEBER
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 634-1729

- and -

MARGARET DIAZ
Attorney
NLRB - Region 12
700 Twiggs Street
Suite 511
Tampa, Florida 33602
Telephone: (813) 228-2669

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

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| | | |
|---|---|---|
| DAVID O. CONGER,<br>LEONARD H. ALSENE,<br>THOMAS S. HODGES, ET AL., | ) | |
| Plaintiffs, | ) | CA. No.<br>88-143-CIV-FTM-10-C |
| v. | ) | |
| INTERNATIONAL BROTHER-<br>HOOD OF ELECTRICAL<br>WORKERS, LOCAL 199,<br>AFL-CIO, OLC, | ) | |
| and | ) | |

NATIONAL LABOR RELATIONS BOARD

Defendants.

MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO DISMISS COMPLAINT

The National Labor Relations Board, one of the defendants herein, moves this Court to dismiss the complaint as to the [2]National Labor Relations Board, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the following grounds:

1. This Court lacks subject matter jurisdiction;

2. The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, and for the reasons discussed in the attached memorandum of law, the National Labor Relations Board requests that its Motion to Dismiss be granted.

Respectfully submitted,

/s/

Margery E. Lieber
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570
Telephone: (202) 634-1729

Co-counsel: JUDY J. SHERMAN
Telephone: (202) 254-9314

- and -

MARGARET DIAZ
Attorney
NLRB - Region 12
700 Twiggs Street
Suite 511
Tampa, Florida 33602
Telephone: (813) 228-2669
Florida Bay #: 320692

Dated at Washington, D.C.
this 13th day January, 1989.

[y:conger1.dlh]

## APPENDIX G

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# MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO DISMISS COMPLAINT IN THE DISTRICT COURT

**13 January 1989**

---

MARGERY E. LIEBER
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 634-1729

- and -

MARGARET DIAZ
Attorney
NLRB - Region 12
700 Twiggs Street
Suite 511
Tampa, Florida 33602
Telephone: (813) 228-2669

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

---

| | | |
|---|---|---|
| DAVID O. CONGER, LEONARD H. ALSENE, THOMAS S. HODGES, ET AL., | ) | |
| Plaintiffs, | ) | CA. No. 88-143-CIV-FTM-10-C |
| v. | ) | |
| INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, OLC, | ) | MEMORANDUM OF LAW IN SUPPORT OF MOTION OF NLRB TO DISMISS COMPLAINT FOR LACK OF JURISDICTION |
| and | ) | |

NATIONAL LABOR RELATIONS BOARD

Defendants.

STATEMENT OF CASE

This case is before the Court upon the complaint of Donald O. Conger, Leonard H. Alsene, Thomas S. Hodges, Patrick R. Leon, Dennis Pfrommer, Starling Roberts, Jr., Dominic M. Skinner, John Todd and Chris Young (the "plaintiffs") against the International [2]Brotherhood of Electrical Workers, Local 199, AFL-CIO, CLC (The "Union" or "IBEW") and the National Labor Relations Board ("the Board") for declaratory and injunctive relief as well as damages, costs and attorneys fees. For the reasons stated below, the Board submits that this complaint should be dismissed as to the Board as the Court lacks subject matter jurisdiction and the complaint fails to state a claim upon which relief can be granted.

STATEMENT OF FACTS

1. Background[1]

United Telephone Company of Florida ("UTF") is a telephone operating company which provides local and long distance telephone service in various parts of the State of Florida. In 1987 UTF disbanded one of its subsidiaries and replaced it with its Business Service Division ("BSD"). The BSD's original compliment of seven business technicians and one warehouse attendant all came from another UTF subsidiary, United Telephone Communications Systems, Inc. ("UTCSI"). Two

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1 The statement of facts herein are taken from the Regional Director's Decision and Clarification of Bargaining Unit. (Attachment C).

additional business technicians were hired into the BSD who had no previous affiliation with UTCSI or UTF.

Prior to establishing the BSD, UTF initiated discussions with the IBEW concerning its plans to establish the BSD.[2] [3]Negotiations between UTF and IBEW resulted in an apparent stalement on the issue of seniority for the business technicians and UTF thereafter refused to extend recognition to the IBEW as the representative of the business technicians and warehouse attendant in the South Division.

2. Board Proceedings

On August 5, 1987, UTF filed with Region 12 of the National Labor Relations Board, located in Tampa, Florida, a Petition for Unit Clarification seeking a determination as to whether or not the nine business technicians and the one warehouse attendant in the BSD constitute an accretion to an existing bargaining unit of approximately 1275 employees represented by the IBEW.[3] (Board Case No. 12-UC-75) (Attachment A).

On September 8, 1987, IBEW filed an unfair labor practice charge against UTF alleging that UTF violated Section 8(a)(1) and (5) of the Act by, inter alia, "refusing to apply the collective bargaining agreement to a group of Communication Technicians." (Attachment B).

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2 UTF and the IBEW are parties to a collective bargaining agreement which went into effect in August 1986 and expires in July 1990. The collective bargaining agreement covers bargaining unit of approximately 1275 employees encompassing various technicians, clerks, operators and warehouse attendants.

3 "The unit represented by the IBEW is a broad one, encompassing approximately 27 job classification, including inter alia, various technicians, mechanics, clerks, operators, and warehouse attendants." (Attachment C, p. 3).

The Regional Office conducted an investigation of the Petition for Unit Clarification, wherein a hearing was held on September 8-11, 14, 15, 1987. On February 11, 1988, the Regional Director, based upon the entire record in the proceeding, issued [4]his decision determining that the business technicians and the warehouse attendant constitute an accretion to the existing IBEW unit. (Attachment C). The Regional Director held that the "[b]usiness technicians and the warehouse attendant perform work very similar, and in many cases identical, to that performed by employees in the established bargaining unit." Additionally, the Regional Director found that in the South Division a "wall-to-wall" or nearly "wall-to-wall" unit existed which provided no basis in which to "carve out a separate unit of business technicians and the warehouse attendant." The Regional Director further noted "that the business technicians and warehouse attendant constitute a numerically small addition to the existing unit. . . and could not constitute a separate, appropriate unit." (Attachment C, p. 13).

Pursuant to Section 102.67 of the Board's Rules and Regulations (29 C.F.R. 102.67) both UTF and IBEW could have filed a request for review of the Regional Director's Decision with the Board. Neither party filed a request for review.

On April 15, 1988, the IBEW withdrew its unfair labor practice charge. (Attachment D).

## ARGUMENT

### THIS COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW THE REGIONAL DIRECTOR'S UNIT CLARIFICATION DECISION ON BEHALF OF THE BOARD

#### A. Representation Proceedings Conducted by the Board are Generally Not Reviewable

The Board is charged with the responsibility of administering the representation provisions contained in Section 9 of the

National Labor Relations Act (29 U.S.C. 159) (the "Labor [5]Act").[4] The Board has express authority under Section 9(c)(1) of the Labor Act (29 U.S.C. 159(c)(1)) to issue certifications of collective bargaining representatives.[5] With such express authority comes the implied authority to police such certifications, including the clarification of a unit, as a means of effectuating the policies of the Labor Act. Thus, the Board's Rules and Regulations (29 C.F.R. Section 102.60(b)) provide that:

> "a petition for clarification of an existing bargaining unit . . . in the absence of a question concerning representation, may be filed by a labor organization or by an employer."[6]

Proceedings conducted under these representation provisions of the Act are non-adversary in nature and their results are neither final or judicially reviewable. A.F.L. v. NLRB, 308 U.S. 401, 409 (1940). In fact, Congress intended to preclude direct court review of representation determinations which are an exercise of the Board's discretion, and to permit review, only indirectly, if and when those determinations form the basis for a final order issued in an unfair labor practice proceeding and [6]reviewable in the court of appeals under Section 10(e) and (f)

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4 Pursuant to Section 3(d) of the Act, 29 U.S.C. 153(d), the Board may delegate to regional directors its powers under Section 9 of the Act, but it retains the authority to review the regional directors' exercise of those delegated powers.

5 Section 9(c)(1) (29 U.S.C. 159(c)(1)) provides in pertinent part, that "[w]henever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board. . . [the Board] shall direct an election by secret ballot and shall certify the results thereof."

6 See also Board's Rules and Regulations, 29 C.F.R. Section 101.17: "If there is a certified or currently recognized representative of a bargaining unit and there is no question concerning representation, a party may file a petition for clarification of the bargaining unit.

of the Labor Act. A.F.L. v. NLRB, 308 U.S. at 409; Boire v. Greyhound Corp., 376 U.S. 473, 476-477 (1964); Bishop v. NLRB, 502 F.2d 1024, 1027 (5th Cir. 1974).

An examination of the legislative history of the National Labor Relations Act compels this conclusion for Congress has considered and rejected legislation which would have provided for limited judicial review of Board representation determinations. Bills were introduced in the 76th Congress providing that a labor organization could obtain direct review of orders in representation proceedings. These bills were not enacted by Congress. S.1000, S. 1264, 76th Cong., 1st Sess. (1939). And in 1947, a bill that passed the House contained an amendment to Section 10(f) which would have permitted an "aggrieved person" to obtain direct post-election review of a Board certification in the courts of appeals. H.R. 3020, 80th Cong. 1st Sess. (1947), I. Leg. Hist. LMRA 199-200, 350-351. The proposed amendment, however, was deleted in favor of the Senate bill which continued the previously existing provisions concerning judicial review without alternation. H.R. Rep. No. 510, 80th Cong., 1st Sess. 56-57 (1947), I. Leg. Hist. LMRA 560-561.

In sum, the plain intent of Congress has been to preclude judicial review of Board representation determinations in the course of representation proceedings unless and until they form the basis for a final and enforceable order issued in an unfair labor practice proceeding. This Congressional determination to limit judicial review to that expressly provided in the Labor Act [7]is a "policy choice" binding on the courts. Califano v. Sanders, 430 U.S. 99, 108 (1977).[7]

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7 Plaintiffs' reliance on 28 U.S.C. Sections 1331 and 1337 does not change this result. Sections 1331 and 1337 while providing general grants of subject matter jurisdiction to federal district courts, do not apply when the applicable regulatory statute precluded it. Board of Trustees of Memorial Hospital v. Donovan, 523 F.2d 845, 846 (10th Cir. 1975); Marshall v. Gibson's Products, Inc. of Plano, 584 F.2d 668, 677 (5th Cir. 1979); Local

[continued]

B. The Instant Case Does Not Fall Within Any Exception To The Rule of Non-Reviewability

Courts have articulated certain narrow exceptions to the rule that Board representation proceedings are not reviewable in district court. One exception to the non-reviewability doctrine is set forth in Leedom v. Kyne, 358 U.S. 184, 188-189 (1958), wherein the Supreme Court found that district court jurisdiction may be asserted to review Board rulings where the Board acted in clear contravention of the Labor Act. The Leedom v. Kyne exception is not applicable to the case at hand as no claim has been made, nor may one successfully be argued, that the Board has violated any specific statutory mandate.[8] A second exception, [8]originally devised in Fay v. Douds, 172 F.2d 720 (2nd Cir. 1949), but never approved by the Supreme Court, suggests district court jurisdiction could arise if the plaintiff can show that a violation of constitutional rights "not transparently

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Union 204 of Int'l Brotherhood of Elec. Workers v. Iowa Elec. Light and Power Co., 668 F.2d 413, 420 (8th Cir. 1982). And, the policy of non-reviewability of Board proceedings in federal district courts is applicable regardless of the manner or review sought, i.e., whether by injunction, declaratory relief or mandamus. Schilling v. Rogers, 363 U.S. 666, 677 (1960); Lexington Cartage Co. v. Teamsters, 713 F.2d 194, 196 (6th Cir. 1983); Mayer v. Ordman, 391 F.2d 889, 892 (6th Cir. 1968); Stafford v. Superior Court of the State of California, 272 F.2d 407, 409 (9th Cir. 1959); U.S. v. First Federal Savings and Loan Association, 248 F.2d 804, 808-809 (7th Cir. 1957).

8 In Leedom v. Kyne, 358 U.S. 184 (1958), district court jurisdiction was found to exist where the Board directed an election in an admittedly mixed bargaining unit of professional and non-professional employees without first having "a majority of such professional employees vote for inclusion in such unit" as is expressly required by Section 9(b)(1) of the Act (29 U.S.C. 159(b)(1)).

frivolous" has destroyed a vested property right.[9] As we show, this exception to the no-jurisdiction rule is not applicable here.

1. The Plaintiffs' constitutional claims form no basis for district court review under Fay v. Douds

As stated above, the Second Circuit in Fay v. Douds, observed that district courts can assert jurisdiction where a Board action raises a substantial question of a violation of constitutional rights. This exception, however, has never been recognized by the Supreme Court (See Boire v. Greyhound, 376 U.S. 473, 481 (1964)) and its continued validity has been questioned by the circuit which created it, as well as other circuits.[10]

In the instant case, Plaintiffs assert that their Fifth Amendment right to due process has been violated because they [9]should have been, but were not, provided with notice and opportunity to be heard in the unit clarification proceeding wherein it was ultimately decided that Plaintiffs constitute an accretion to the existing IBEW unit. Plaintiffs further assert that their First Amendment right has been violated since they have a right to refrain from association with a Union. Plaintiffs' bald claims fail to assert any violation of a constitutional right which would support the district court's assertion of jurisdiction in this case.

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9 Another exception (not even remotely relevant here) permits district court review of Board actions involving important national interests with international ramifications. McCulloch v. Sociedad Nacional, 372 U.S. 10, 17 (1963).

10 See, Herald Co. v. Vincent, 392 F.2d 354, 359 (2d Cir. 1968); NLRB v. Interstate Dress Carriers Inc., 610 F.2d 99, 107 (3d Cir. 1979); Greensboro Hosiery Mills, Inc. v. Johnston, 377 F.2d 28, 32 (4th Cir. 1967); Boire v. Miami Herald Publishing Co., 343 F.2d 17, 21 (5th Cir.), cert. denied, 382 U.S. 824 (1955); Blue Cross and Blue Shield of Michigan v. NLRB, 609 F.2d 240, 244 fn.2 (6th Cir. 1979); Squillacote v. International Brotherhood of Teamsters, Local 344, 561 F.2d 31, 37-38 (7th Cir. 1977).

The Plaintiffs' contention that the Union's representation abridges their First Amendment right of freedom of association is meritless. Section 7 of the Labor Act provides, in pertinent part, that all employees shall have the right either to "join . . labor orgainizations" or to "refrain from . . . such activities." The rights guaranteed by Section 7 are not unqualified, and one well-recognized limitation results from the principle of exclusive representation embodied in Section 9(a) of the Labor Act. See, Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 61-70 (1975); NLRB v. Tanner Motor Livery, Ltd., 419 F.2d 216, 218-221 (9th Cir. 1969). For under Section 9(a), the representative selected by a majority of the employees in an appropriate bargaining unit represents all the employees in the unit, including that minority of the employees who did not choose to be represented by it and who would prefer to exercise their Section 7 right to refrain from being represented by it.

[10]Moreover, the principle of exclusive representation "extinguishes the individual employees's power to order his own relations with his employer" and "only the union may contract the employee's terms and conditions of employment[.]" NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 180 (1967). This principle was designed to serve the cause of "orderly collective bargaining" (Medo Photo Corp. v. NLRB, 321 U.S. 678, 685 (1944)) and comports with the Labor Act's declared policy of promoting industrial peace by encouraging the collective bargaining process. See, Section 1 of the Labor Act.

The Supreme Court recognized that the restraints imposed on individual rights under the principle of exclusive representation would be wholly unjustifiable unless the exclusive representation had a reciprocal obligation to fully and fairly represent all the employees. Wallace Corp. v. NLRB, 323 U.S. 248, 255-256 (1944). See also, Vaca v. Sipes, 386 U.S. 171, 177 (1967). The duty of fair representation was conceived as a protection for employees faced with the reduction of their individual rights corresponding with the grant of power to unions

to act as their exclusive collective bargaining representative.[11] Vaca v. Sipes, 386 U.S. at 182; NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. at 181. It has [11]served as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." Vaca v. Sipes, 386 U.S. at 182.

In light of the well established principles governing majority rule and the protections given to the minority, it is clear that Plaintiffs' First Amendment allegation must fail. Plaintiffs' First Amendment allegation ignores the principle that federal labor laws seek to promote industrial peace through a "system of employee organization and collective bargaining . . . [and that] [t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." Vaca v. Sipes, 386 U.S. 171, 182 (1967). "Congress gave to a union selected by a majority in an appropriate unit the right to obtain recognition for the entire unit including a non-consenting minority." NLRB v. Appelton Electric Co., 296 F.2d 202, 206 (7th Cir. 1961).

As Plaintiffs' First Amendment allegation fails so must their Fifth Amendment claim. Contrary to Plaintiffs' assertion, their right to due process has not been violated because they have no absolute right to be heard in the unit clarification proceeding wherein it was ultimately decided that Plaintiffs constitute an accretion to the existing IBEW unit.

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11 In conformity with this general principle, the Board has held, with court approval, that Section Section 8(b)(1)(A) of the Labor Act imposes upon unions the obligation to "serve the interests of all members without hostility or discrimination toward any, to excerise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. at 177-178. Section 8(b)(1)(A) of the Labor Act makes it an unfair labor practice for a labor organization to "restrain or coerce employees in the exercise of the rights guaranteed in Section 7."

An "accretion" is merely the addition of new employees to an already existing group, wherein the new employees are covered by the existing collective bargaining agreement. In essence, "the [12]doctrine is designed to preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." NLRB v. Stevens Ford, Inc., 773 F.2d 468, 473 (2d Cir. 1985). It is through unit clarification procedures in which the Board determines whether employees should be added to a particular bargaining unit. Pursuant to Section 102.60(b) of the Board's Rules and Regulations a petition for unit clarification may be filed by either a labor organization or by an employer. Further, the Board's Casehandling Manual (Part Two) Representation Proceedings, Sections 11490-11498 sets forth the procedures for the Regional Staff to follow in handling representation cases under the Labor Act. In brief, the guidelines require that, upon the filing of a petition, the Board's Regional staff conduct an investigation and, if necessary, a hearing. The Regional Director could, however, issue a decision clarifying that unit or a decision and order dismissing a petition solely on the basis of such an investigation. As discussed above, if a party is dissatisfied with the decision, it may file a Request for Review of the Regional Director's decision with the Board in Washington D.C.

"The theory of unit clarification, insofar as adding positions to the collective bargaining unit, is that the added employees functionally are within the existing bargaining unit but had not formally been included due to changed circumstances." NLRB v. Mississippi Power & Light Co., 769 F.2d 276, 279 (5th [13]Cir. 1985) (citations omitted). The added employees are thus "properly governed by the larger group's choice of bargaining representative." NLRB v. Security Columbian Banknote Co., 541 F.2d 135, 139 (3d Cir. 1976). "An accretion decision, like other unit determination, is generally committed to the Board's informed discretion." Id. at 140-141, citing, NLRB v. Sunset House, 415 F.2d 545, 548 (9th Cir. 1969); Spartans Industries, Inc. v. NLRB, 406 F.2d 1002, 1005 (5th Cir. 1969) See also, Local

Union 204, et al. v. Iowa Elec. Light & Power Co., 668 F.2d 413, 417, 420 (8th Cir. 1982); Bishop v. NLRB, 502 F.2d 1024, 1027 (5th Cir. 1974); National Ass'n of Women and Children's Apparel Salesmen, Inc. v. FTC, 479 F.2d 139, 144 (5th Cir.) cert. denied, 414 U.S. 1004 (1973). As discussed above (pp.4-6), this decision is non-reviewable by the district court.[12]

The language in Section 9(b) does not mandate the manner in which the Board will conduct representation proceedings. Indeed, Section 6 of the Act (29 U.S.C. 156) Congress left to the Board the function of prescribing its own rules and regulations for accomplishing this task. As the Supreme Court recognized in NLRB [14]v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940), the Board must of necessity develop procedures and requirements which are not addressed in the statute since the control of the representation process and the determination of the necessary ingredients are "matters which Congress entrusted to the Board alone." And in the intervening years, although Congress has amended the Act several times, it has never added any provision concerning unit clarification procedures. Rather in its discretion the Board has developed unit clarification proceddings and has promulgated rules and regulations for unit clarification cases. A unit clarification proceeding may be initated by either an employer or a labor organization; no provision of the Board's

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12 Since accretion effectively works to deny the accreted employees a right to vote on their choice of bargaining representative, the Board restrictively applies the accretion principle. Thus, factors which are not generally considered in unit determinations are taken into account before an accretion can be made. "One such factor is whether the group of employess to be accreted constitutes an appropriate unit." NLRB v. Stevens Ford, Inc., 773 F.2d at 473 (citations omitted). Accordingly here, the Regional Director made a finding that the business technicians and warehouse attendant constitute such a numerically small addition to the existing IBEW unit, that they could not constitute a separate, appropriate unit. (Attachment C., p. 13).

Rules and Regulations exists allowing employees to do so.[13] Most notably the Board's rules and regulations expressly leave in the discretion of the Board's regional director the question of whether to hold a hearing upon a proposed unit clarification. Specifically, the rules and regulations require that hearings be held in "appropriate" cases. 29 C.F.R. 102.63(b). Employees do not have a right to a hearing in accretion cases. See, DePratter v. Farmer, 232 F.2d 74 (D.C. Cir. 1956). Indeed, even "parties" [15]to a unit clarification proceeding do not have an absolute right to a hearing. See, Valentino v. McCulloch, 67 LRRM 2812, 2813 (W.D.N.Y. 1966).

As Plaintiffs had no right to participate in the unit clarification proceeding, Plaintiffs' do not have any due process rights which could have been violated. Indeed, as the Board's Regional Director conducted the unit clarification proceeding in compliance with the statutory provisions governing representation proceedings, and with the agency's published rules and regulations prescribing notice and investigation for such unit clarification cases, Plaintiffs' complaint and relief prayed for, would invalidate Section 9(b) of the Act as unconstitutional. Yet the Supreme Court long ago ruled that the Act's procedural provisions "do not offend against constitutional requirements governing the creation and action of administrative bodies." NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 46, 47 (1936).

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13 Additionally, no statutory review procedure exists allowing an employee to appeal a Board representation proceeding. As the House Committee Report stated when the House attempted unsuccessfully to broaden the post-election review of a Board Certification: "This procedure is unfair to everyone; the union that wins, which frequently must wait for many months to exercise its rights; the union that loses, which has no appeal at all no matter how wrong the certification may be; the employees, who also have no appeal; and the employer, for whom an appeal involves grave risk." H.R. 3020, 80th Cong., 1st Sess. (1947), Leg. Hist. LMRA, 199-200, 350-351. (emphasis added)

Accordingly, as Plaintiffs make no showing of a denial of constitutional rights, the Court is without jurisdiction to review the Board's unit clarification determination.

[16]Conclusion

For the foregoing reasons, it is respectfully requested that the complaint be discussed in its entirety for lack of jurisdiction.

Respectfully submitted,

/s/

Margery E. Lieber
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570
Telephone: (202) 634-1729

Co-counsel: Judy J. Sherman
Telephone: (202) 254-9314

and

MARGARET DIAZ
Attorney
NLRB - Region 12
700 Twiggs Street
Suite 511
Tampa, Florida 33602
Telephone: (813) 228-2669
Florida Bar #: 320692

Dated at Washington, D.C.
this 13th day of January, 1989.

[y:memsppt.dms]

**ATTACHMENT TO**

**NATIONAL LABOR RELATIONS BOARD**

**PETITION**

**1. Purpose of this Petition**

**/X/ UC-Unit Clarification —** PRESENT bargaining unit (see #5) previously certified, although case number unknown. At issue is unit of Business Technicians/Warehouse Person, previously with non-union deregulated subsidiary, which company (UTCS) was dissolved and brought into UTF 7/1/87.

**5. Unit Involved**

**Included:**

All employees in the Regulated Operating Company's South Division (Fort Myers, Naples, Punta Gorda and Avon Park Districts) in these Classifications: Cable Splicer, Communications Technician-A, Central Office Technician, Local Testboard Technician, Toll Technician, Toll Service Technician, Facilities Technician, Repair Shop Technician-A, Central Office Installer, Service Technician, House Service Mechanic, Line Technician, Communications Technician-B, Communications Technician-C, Vehicle Mechanic, Drafting

Technician, Repair Shop Technician-B, Utility Person, Warehouse Person, Frame Person, House Service Person, Clerk-P, Operator, Clerk-T, Cashier, Clerk-C, Machine Operator, Messenger, Service Representative.

**Excluded:**

Employees in the Company's new Deregulated Business Services Division in these Classifications: Business Technician and Warehouse Person.

**National Labor Relations Board**
**Petition Form**
**Omitted in Printing**

**National Labor Relations Board**
**Charge Against Employer Form**
**Omitted in Printing**

Attachment B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

UNITED TELEPHONE COMPANY
OF FLORIDA

Employer/Petitioner

and Case 12-UC-75

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 199,
AFL-CIO, CLC

Union

## DECISION AND CLARIFICATION OF BARGAINING UNIT

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[1] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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[1]The briefs of the parties have been carefully considered.

2. The Employer, United Telephone Company of Florida (sometimes referred to herein as "UTF") is engaged in commerce within the meaning of [2]the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[2]

3. The International Brotherhood of Electrical Workers, Local 199, AFL-CIO, CLC (referred to herein as the "Union" or the "IBEW") is a labor organization within the meaning of the Act.

4. The Employer filed the petition herein seeking a determination as to whether or not approximately nine business technicians and one warehouse attendant in the South Division of its Business Services Division (herein called "BSD") constitute an accretion to an existing bargaining unit of approximately 1275 employees represented by the Union. The Employer takes the position that the 10 employees are not an accretion to the existing unit. The Union contends that the Employer has violated Section 8(a)(5) and (1) of the Act by its conduct with respect to the business technicians and warehouse attendant, as alleged in an unfair labor practice charge, and that the petition herein should be dismissed while the processing of the charge should proceed. The Union alternatively contends that the business technicians and warehouse attendant constitute an accretion to the existing unit.

As noted already herein, the Employer is a telephone operating company which provides local and long distance telephone service in various parts of the State of Florida. The

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[2]The Employer, a Florida corporation with its corporate headquarters located in the Altamonte Springs, Florida area, is engaged in the business of providing local and long-distance telephone service to customers in a number of counties in the State of Florida. During the 12-month period immediately preceding the commencement of the hearing in this case, the Employer, in the course and conduct of its business operations, derived gross revenues in excess of $500,000, and during that same period of time purchased and received at its Florida facilities products, goods, and materials valued in excess of $50,000 directly from points outside the State of Florida.

Employer has eight districts within its [3]Florida operation, and the eight districts comprise two divisions, a North Division and a South Division. The geographic territory covered by the eight districts is the territory for which the Florida Public Service Commission (herein called the "FPSC") has granted the Employer an exclusive franchise to provide local exchange services.

The Employer as it exists today resulted from the merger in 1983 of three local telephone companies: what was then UTF (the current South Division of the Employer), Winter Park Telephone Company, and Florida Telephone Corporation. Before and after the merger, employees in the South Division have been represented by the IBEW,[3] and former employees of Florida Telephone Corporation (the current Ocala, Leesburg and Winter Garden districts of the North Division) have been represented by the Communications Workers of America (herein called the "CWA"). The Employer and the IBEW are parties to a current collective bargaining agreement, which went into effect in August 1986, and will expire in July 1989.[4] Employees of what was formerly the Winter Park Telephone Company (currently the Winter Park district of the North Division) have not been represented by a labor organization before or after the merger.

Historically, all aspects of telephone service, including customer premises equipment (herein called "CPE"), inside wiring, and access lines between customers and telephone company switching centers, were provided by local exchange telephone companies. A telephone company was granted a monopoly to provide this "end to end" service in its franchised territory, and in return the company was regulated by both state

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[3]The unit represented by the IBEW is a broad one, encompassing approximately 27 job classifications, including, inter alia, various technicians, mechanics, clerks, operators, and warehouse attendants.

[4]Also, the Employer apparently has a current collective bargaining agreement with the CWA.

and federal government [4]agencies. However, in recent years, various aspects of the telephone industry have been deregulated. One aspect of the telephone industry that has been subject to changes in regulatory policy is CPE. In 1980, the Federal Communications Commission (herein called the "FCC") ruled that as of January 1, 1983, local exchange telephone companies could not purchase any new CPE (or terminal equipment) for lease or sale (except, apparently, on a non-tariffed, non-regulated basis). In 1982, the FPSC ruled that beginning January 1, 1983, local exchange telephone companies in Florida could no longer provide (lease or sell) or maintain new CPE except though a "fully separated affiliate, utilizing separate facilities, personnel and records of account." From that point on, a local exchange telephone company could only provide and maintain the CPE it had on hand before January 1, 1983; that CPE became known as the Company's "embedded base."

Prior to January 1, 1983, the Employer provided CPE to business and other customers on a leased basis and maintained it. Beginning January 1, 1983, the Employer could not lease, sell, or maintain CPE, except that in its embedded base. Beginning sometime prior to January 1, 1983, and continuing until late 1983 or early 1984, another related company, Utelcom,[5] was selling business terminal equipment as well as maintaining it.

After Utelcom was disbanded in late 1983 or early 1984, the Employer formed, in March of 1984, a separate subsidiary, United Telephone Communications Systems, Inc. (herein called "UTCSI") to sell and maintain business terminal equipment.[6] At the time it was formed, UTCSI assumed the maintenance contracts and warranty obligations of Utelcom. Also in 1984 [5]when UTCSI was created, 3212 business accounts were transferred

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[5]Utelcom and UTF shared the same parent corporation, United Telecommunications, Incorporated.

[6]Neither employees of Utelcom nor employees of UTCSI were represented by a labor organization.

from the Employer to UTCSI.[7] From 1984 until 1987, approximately 500 more accounts were transferred from the Employer to UTCSI. UTCSI's original complement of technicians (who were later to be called "business technicians") apparently consisted of a number of employees who until then had been employed by UTF in the IBEW bargaining unit, one employee whose most recent previous employer had been Utelcom (but who had before then worked for UTF), and possibly a couple of others.

In 1986, the Employer obtained a waiver from the FPSC of its requirement of a separate subsidiary to provide and maintain new CPE. Then, believing that it made better business sense to bring the work back into UTF, the Employer in 1987 disbanded UTCSI and replaced it, effective July 1, 1987, with the BSD. The BSD's original complement of seven business technicians and one warehouse attendant all came from UTCSI; prior to their terms of employment with UTCSI, all seven business technicians had been bargaining unit employees of UTF in the IBEW unit, with one having had an intervening position with Utelcom. Subsequently, two additional business technicians were hired who had no previous affiliation with UTSCI or UTF.

As of December 31, 1987, the provision and maintenance of CPE was further "deregulated" and local operating companies were no longer allowed to maintain expenses associated with CPE on their regulated, intrastate books. Employer witnesses testified at the hearing that they planned to transfer accounts from the "regulated side" of UTF to the BSD after the [6]deregulation of December 31, 1987.[8] An Employer witness further testified that the initial accounts he expected to be transferred were ones

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[7]In connection with the transfers, customers bought their CPE, which they had previously leased from the Employer. Following the sales, UTCSI took over the maintenance work.

[8]Transfers of work to the BSD (and away from IBEW bargaining unit employees) are not mandated by deregulation. However, separate "books" must be maintained for the regulated versus deregulated work.

viewed by the Employer as "high visibility" accounts; he estimated that 50 to 75 PBX accounts and 700 to 1000 key systems[9] would be transferred from the regulated side to the BSD after December 31, 1987. With the transfer of the "high visibility" accounts, the Employer was to begin implementing its plan to ultimately have all business accounts handled by the BSD.[10]

Prior to establishing the BSD, the Employer initiated discussions with the IBEW and CWA concerning its plans to establish the BSD. The Employer and the CWA agreed that the former UTCSI technicians in all districts of the North Division except Winter Park should be included in the existing CWA bargaining unit in a new "business technician" classification, and agreed to terms and conditions of employment for the business technicians.[11] Negotiations between the Employer and the IBEW resulted in an apparent stalemate on the issue of seniority for the business technicians. The Employer thereafter refused to extend recognition to the IBEW as the representative of the business technicians and warehouse attendant in the South Division. Since July 1, 1987, the Employer has [7]treated business technicians and the warehouse attendant in the South Division as unrepresented employees.

As indicated above, the BSD sells, installs and maintains CPE for business customers, and business technicians are the

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[9]Key equipment allows a customer the option of having access lines terminating at its business; a number of telephone sets, with lighted keys or buttons are then extended from those lines. PBX systems are larger and provide switching services on the customer's premises, allowing for calling between desks at the particular business.

[10]Since the hearing in this case was completed prior to December 31, 1987, the record does not reflect which accounts, if any, have actually been transferred, beginning January 1, 1988.

[11]Charges against the Employer and the CWA are pending in the investigative stage in this Region, raising the issue of whether the inclusion of business technicians in the CWA unit was lawful.

employees within the BSD who perform the installation and repair of that equipment.[12] On the regulated side of UTF, approximately 50 communications technicians perform the repair, and moves, adds, and changes of CPE for business customers in the South Division.[13] Some of the equipment sold, installed, and maintained by the BSD is the same as that in the regulated side's embedded base.[14] However, because no new CPE was added (or could be added) to the embedded base from December 31, 1982, until December 31, 1987, the CPE dealt with by the BSD includes newer, more advanced equipment than that dealt with by communications technicians. The newer equipment tends to be more computer (digital) based, providing more functions and features to the customer than was available previously. While the communications technicians have in the past serviced equipment only in the areas in which the Employer was franchised by the FPSC, the BSD has not been so limited, and has been able to provide services beyond the franchise boundaries.[15]

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[12]However, installations are largely handled by outside contractors, who business technicians may be called upon to assist and/or oversee. Business technicians also perform "moves, adds, and changes" which apparently involve the same or many of the same skills as initial installations.

[13]Prior to January 1, 1988, the CPE worked on by the unit communications technicians was equipment in the embedded base leased to customers by UTF, and the CPE worked on by the BSD (and UTCSI before it) was customer-owned equipment or equipment leased to the customer by an entity other than UTCSI or UTF.

[14]In the 6 months immediately preceding the hearing in this case, less than half the accounts serviced by the BSD were accounts with equipment unique to the BSD.

[15]In view of the further deregulation of CPE as of December 31, 1987, it appears that this geographical limitation on where communications technicians work would no longer apply.

[8]Employer witnesses estimated that most business technicians spend 75 to more than 95 percent of their time doing repair work. They maintain the key and PBX area equipment and customer cable; their work stops at the demarcation point which separates the customer's equipment and UTF's lines. Additional duties of business technicians may include occasionally overseeing installation work performed by outside contractors,[16] visiting jobsites to assist in preparing costs estimates, checking out customer complaints to see if customers should be charged for work, assisting in sales work,[17] and, in emergency situations, directly contacting vendors or manufacturers to order parts that are unavailable in the warehouse. For the most part, it appears that communications technicians do not perform the above-described additional duties. Communications technicians do perform work on access lines, however, which business technicians do not. Business technicians and communications technicians use similar types of tools and equipment, but due to the differences in the work they perform, their tools and equipment vary somewhat, also.

A business technician trainee or communications technician trainee begins with a basic understanding of electricity and the

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[16]The business technician who was classified as lead technician at UTCSI (Dennis Pfrommer) is the primary business technician who has overseen installation work. (In fact, from the time the BSD came into being until the hearing in this case, Pfrommer was apparently the only business technician who had done this.) An Employer witness estimated that Pfrommer spends about 78 to 80 percent of his time overseeing or otherwise assisting in installation work by outside contractors. The business technician in addition to Pfrommer who in the past had most frequently done this work had apparently been spending about 10 percent of his time on installation work. No party has contended that Pfrommer or any other business technician is disqualified from being part of the IBEW bargaining unit by virtue of any special duties. In this regard, the parties specifically stipulated at the hearing, and based on the entire record I so find, that the business technicians are not statutory supervisors.

[17]Business technicians are not the BSD's primary sales force; instead, approximately 18 sales persons are employed in the BSD.

communications [9]field. Training then progresses through the various types of equipment, with different pieces of equipment requiring specific training. In most cases, training for key equipment is conducted at the Employer's own training center in Altamonte Springs, Florida. On the other hand, for the more complex PBX equipment, in most cases training is provided by the equipment manufacturers themselves.[18] When training on a particular piece of equipment is completed, a certificate of training is provided to the employee by either the Employer's training center or the manufacturer. Training is an on-going process, because new products and modifications to existing products continue to be developed. Not all communications technicians are certified or otherwise trained on all equipment serviced by their group, nor are all business technicians certified or otherwise trained on all equipment serviced by the BSD. It appears that ordinarily the Employer attempts to send only a technician certified on the particular equipment to work on complex PBX equipment.[19] However, uncertified personnel are sent out on occasion, and they may be able to correct the problem.[20]

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[18]Formal training sessions for particular pieces of equipment currently range from about 3 to 15 days. Training sessions conducted by manufacturers are often quite costly.

[19]The trend is for manufacturers of the complex equipment to require that certified technicians do installations, with the penalty for not using certified personnel being voiding of warranties. Also, manufacturers of the complex equipment do not give telephone assistance to technicians unless they are certified; however, the record is not clear as to whether manufacturers otherwise require certified personnel to make repairs.

[20]The various systems have common features (such as the telephones themselves) and the problem may not be in the discrete portion of the system for which training (and certification) is required. In such a case, an uncertified technician could resolve the problem. Also, the uncertified technician might be able to resolve the problem after getting telephone assistance from a certified technician.

[10]Communications technicians and business technicians have separate, immediate supervision.[21] The BSD is a separate administrative division of the Employer, and South Division business technicians currently report directly to the BSD service manager, who is located in Altamonte Springs.[22] Communications technicians, on the other hand, are part of the customer service division, and they report to "service supervisors-complex."

There has been very little in the way of temporary interchange between business technicians and communications technicians since the formation of the BSD. However, the Employer has put into effect, and notified its employees, of a system whereby communications technicians could be called upon to assist the BSD.[23] Likewise, the record reflects no communications technicians who have transferred to business technician positions on a permanent basis, or vice versa, since the BSD became operative. The Employer did post the two business technician positions that it filled after July 1, 1987, for bid by its other employees, and the Employer selected two communications technicians who bid to fill the business technician jobs; however, the employees then decided they did not want the jobs and the Employer subsequently hired the two outsiders.[24]

Wage ranges for communications technicians and business technicians are similar; at the top end of the ranges, communica-

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[21]Of course, in the large IBEW unit, employees in different locales and different classifications also have separate, immediate supervision.

[22]The Employer eventually plans to add an intermediate supervisor for the South Division business technicians.

[23]And business technicians have, since July 1, 1987 done some work on a couple of occasions on the regulated side of the demarcation point.

[24]Furthermore, the Employer has announced plans to "gradually phase in" communications technicians to the BSD, and an Employer witness acknowledged that the communications technician jobs will be "shrinking off and dying" over time.

tions technicians make $13.99 per hour, while business technicians make $14.65 per hour. Benefits, [11]such as health insurance and travel pay, differ; communications technicians are accorded benefits pursuant to the IBEW contract while business technicians are accorded the benefits received by other unrepresented employees of the Employer.

Communications technicians report to work centers each morning. Business technicians, on the other hand, receive their first dispatches of the day at their homes, and then go directly to the areas where the work is to be performed. Communications technicians are assigned company trucks, which they park at the work centers at the end of their shifts. Business technicians have assigned station wagons, which they park at their homes. South Division business technicians live in Ft. Myers and nearby communities. The Employer attempts to assign business technicians to jobs as close to their home locations as possible, but they might be assigned to jobs as far north as Altamonte Springs, which is outside the geographical area covered by the South Division. However, South Division Communications technicians have apparently historically worked only in the South Division.

The regular hours of work for business technicians and communications technicians are apparently 8 a.m. to 5 p.m. Different systems for handling after hours work are in effect for business technicians and communications technicians.

Business technicians are required to wear dress shirts with ties, while communications technicians are not.

The South Division BSD warehouse attendant works at a warehouse in Ft. Myers, Florida, which is separate from the customer service warehouses. Unlike the customer service warehouses, the BSD warehouse is a one-person operation. The BSD warehouse attendant acts as a support person to the business technicians, providing parts and equipment to them; he additionally [12]performs inventory functions, orders parts, prepares purchase orders, and occasionally may drive to another

part of the state to obtain needed parts.[25] The wage range of the BSD warehouse attendant is similar to that of warehouse attendants in the IBEW unit, with the rate at the high end of the range being $11.39 per hour for the BSD warehouse attendant and $11.20 per hour for the customer service warehouse attendants. The benefits of the BSD versus customer service warehouse attendants differ, as do those of all represented versus unrepresented employees. The BSD warehouse attendant reports to the BSD installation supervisor. The record reflects no interchange between the BSD warehouse attendant and employees outside the BSD.

Labor policies for the BSD and the rest of the Employer's operation are set at the Employer's headquarters in Altamonte Springs, Florida. Likewise, accounting and legal functions for the entire company are handled out of the Employer's headquarters in Altamonte Springs.[26]

Based on the foregoing, and the record as a whole, I find that the South Division business technicians and BSD warehouse attendant constitute an accretion to the existing IBEW unit.[27] Business technicians and the warehouse attendant perform work very similar, and in many cases identical, to that performed by employees in the established bargaining unit. Furthermore, some of the very repair work now performed by the BSD was, prior to the creation of UTCSI, originally performed by unit employees, and the Employer now again plans to transfer unit work to the BSD. Terminal [13]equipment worked on by business technicians is part of the integrated telephone system, with the terminal

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[25]The BSD sometimes obtains parts from the customer service division.

[26]Although the record is somewhat sketchy on these points, the Employer acknowledges in its brief, the accuracy of these facts concerning centralized functions.

[27]In so deciding, I am declining the Union's request that I first decide the unfair labor practice issues raised in its charge against the Employer.

equipment eventually hooking up to access lines maintained by employees in the existing unit. Since the establishment of the BSD, business technicians have (although not frequently) worked on the regulated side of the demarcation point, performing work that otherwise would be done by unit employees, and the Employer is actively seeking to fold the communications technician classification into the business technician classification over time. I further note that the business technicians and warehouse attendant constitute a numerically small addition to the existing IBEW unit, and in my view, could not constitute a separate, appropriate unit.[28] In deciding that the approximately 10 BSD employees constitute an accretion, I have considered all the facts, noting that, as is not uncommon, some facts favor a finding of accretion and some do not. See The Great A & P Tea Co. (Family Savings Center), 140 NLRB 1011 (1963). However, despite some factors mitigating against a finding of accretion, I conclude that the record as a whole demonstrates that business technicians and the BSD warehouse attendant are an accretion to the IBEW unit. See Safelite, Division of Lear Siegler, Inc., 277 NLRB 782 (1985); Universal Security Instruments, Inc., 250 NLRB 661 (1980), enforced in pertinent part at 649 F.2d 247, 107 LRRM 2518 (4th Cir. 1981); The Great A & P Tea Co. supra.[29]

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[28]While the employees of the Employer are not as a whole, part of a systemwide unit, I note that a systemwide unit is the optimal unit in the public utility setting. See New England Telephone and Telegraph Co., 280 NLRB No. 16 (1986). Furthermore, in the South Division there exists what is apparently a "wall-to-wall" or nearly "wall-to-wall" unit, and I find no basis for carving out a separate unit of business technicians and the warehouse attendant.

[29]Both parties to this proceeding have requested that I decide whether or not business technicians are, in fact, communications technicians, subject to the provisions of the current collective bargaining agreement specifically relating to communications technicians. While I find that the business technicians are an accretion to the unit, it is nonetheless clear that some of their duties, as well as some of their working conditions, are not the same as, or coextensive with, those of communications technicians. I there-fore find that business technicians are not communications technicians.

[14]ACCORDINGLY, IT IS HEREBY ORDERED that the existing IBEW unit be, and it hereby is, clarified to include the South Division BSD business technicians and warehouse attendant.

DATED at Tampa, Florida, this 11th day of February, 1988.[30]

/s/

Francis E. Dowd, Regional Director
National Labor Relations Board, Region 12
700 Twiggs Street, Suite 511
P.O. Box 172068, Tampa, Florida 33672

[30]Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW, Washington DC 20570. This request must be received by the Board in Washington by February 25th 1988.

**UNITED STATES GOVERNMENT**
**NATIONAL LABOR RELATIONS BOARD**
**REGION 12**
**700 Twiggs Street - Suite 511**
**P.O. Box 172068**
**Tampa, FL 33672-0068** **Telephone (813) 228-2641**

April 15, 1988

Kay L. Wolf, Assistant Vice-President, Law
United Telephone Company of Florida
P.O. Box 5000
Alamonte Springs, FL 32715-5000

Re: United Telephone Company of Florida
Case 12-CA-12679

Dear Ms. Wolf:

This is to advise you that, with my approval, the charge in the above-captioned case has been withdrawn.

Very truly yours,

Francis E. Dowd
Regional Director

cc: International Brotherhood of Electrical
Workers, Local 199, AFL-CIO, CLC
2141 Jackson Street
Ft. Myers, FL 33901-3637

Thomas Pilacek, Esq.
1516 Hillcrest Street, Suite 204
Orlando, FL 32803

Attachment D

# APPENDIX H

## ANSWER INCORPORATING DEFENSES OF IBEW LOCAL 199

**10 January 1989**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

CASE NO. 88-143-CIV-FTM-10-C

DAVID O. CONGER, et al.,

Plaintiffs,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, etc., et al.,

Defendants.

_____/

**ANSWER INCORPORATING DEFENSES OF IBEW LOCAL 199**

Defendant INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199 [LOCAL 199] hereby responds to the allegations of the complaint against them.

FIRST DEFENSE

The complaint fails to state a claim against this Defendant upon which relief may be granted.

SECOND DEFENSE

Plaintiffs have failed to bring this lawsuit within the applicable statute of limitations.

THIRD DEFENSE

The complaint is not well-grounded in fact nor warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and this Defendant is therefore entitled to sanctions against [2]Plaintiffs and/or their attorney.

FOURTH DEFENSE

Plaintiffs' claim is pre-empted by the provisions of the Labor-Management Relations Act of 1947, as amended.

FIFTH DEFENSE

The complaint is not in the form required by Rule 10(b), Fed. R. Civ. P., in that the averments of Plaintiffs' claims are not made in separately numbered paragraphs; and it is therefore difficult and burdensome for this Defendant to file a responsive pleading.

SIXTH DEFENSE

Plaintiffs lack standing to sue for the relief requested in the complaint against this Defendant.

SEVENTH DEFENSE

Plaintiffs have failed to allege facts which would entitle them to injunctive relief against this Defendant.

EIGHTH DEFENSE

Plaintiffs have failed to meet the requirements of 28 USC §2201 and Rule 57, Fed. R. Civ. P. and are therefore not entitled to declaratory relief against these Defendants.

## NINTH DEFENSE

Plaintiffs have failed to join an indispensable party to this action, i.e., United Telephone Company of Florida, which is a party to the order of the National Labor Relations Board complained of by Plaintiffs in Count I of the [3]complaint.

## TENTH DEFENSE

Plaintiffs have failed to allege that the provisions of the Labor-Management Relations Act of 1947, as amended, under which they allege LOCAL 199's complained-of conduct was taken, are unconstitutional; and the complaint is therefore defective on its face.

## ELEVENTH DEFENSE

Plaintiffs have waived any right they may have otherwise had to complain of the conduct forming the subject of the complaint by failing to seek intervention in the NATIONAL LABOR RELATIONS BOARD proceedings after having received actual notice thereof.

## ANSWER

Defendant LOCAL 199 hereby answers the averments of Plaintiffs' complaint as follows:

1. LOCAL 199 admits that it is a labor organization within the meaning of §2(5) of the National Labor Relations Act, 29 USC §151, et seq., [the Act] and has a collective bargaining relationship with United Telephone Company of Florida [the Company] obtained through the process of collective bargaining as described by the Act, and is therefore the exclusive legal representative of the employees covered by the collective bargaining agreement which have been determined by the National Labor Relations Board to constitute an appropriate bargaining unit pursuant to §9(a) [4]of the Act, 29 USC §159(a).

2. LOCAL 199 admits that Defendant NATIONAL LABOR RELATIONS BOARD [the Board] is an administrative agency of the United States duly constituted and existing in accordance with the laws of the United States.

3. LOCAL 199 denies that this Court has subject matter jurisdiction over Plaintiffs' claims in that Plaintiffs have failed to allege any claim cognizable under the stated authorities. LOCAL 199 admits that this honorable Court has jurisdiction to determine its own jurisdiction in accordance with 28 USC §1331, et seq.

4. LOCAL 199 admits that it was involuntarily made a party to a proceeding before the NATIONAL LABOR RELATIONS BOARD by the Company in Case No. 12-UC-75 involving job classifications within a portion of the Company's operations entitled the "Business Systems Division". LOCAL 199 further admits that as the result of the proceedings conducted by the BOARD in that proceeding, the BOARD determined that the Business Systems Division technician classification and warehouse employee classification properly constitute an accretion to LOCAL 199's existing bargaining unit because of the Employer's change of operations.

5. LOCAL 199 specifically denies that it has any duty of any kind or nature to Plaintiffs, or that it violated [5]any duty which it might have arguably owed to Plaintiffs.

6. Except as so admitted and averred, each and every allegation of Plaintiffs' complaint, whether specifically addressed herein or not, is denied.

WHEREFORE, having fully answered Plaintiffs' complaint, LOCAL 199 respectfully prays that the complaint be dismissed on its face with prejudice, and that LOCAL 199 be awarded its costs and attorneys' fees incurred as the result of having to defend against Plaintiffs' claims.

I HEREBY CERTIFY that a true copy of the foregoing was mailed to John P. Kelly, Esq. and Stuart Rosenfeldt, Esq.,

FLEMING, O'BRYAN & FLEMING, Broward Financial Centre, 500 E. Broward Boulevard, P.O. Drawer 7028, Ft. Lauderdale, FL 33338; Edwin V. Vieira, Esq., 13877 Napa Drive, Independent Hill, VA 22111; Hugh L. Reilly, Esq., National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Suite 600, Springfield, VA 22160; and Judy Sherman, Esq., Office of the General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, NW, Washington, DC 20570, this 10th day of January, 1989.

PILACEK & COHEN
1516 E. Hillcrest Street
Suite 204
Orlando, FL 32803
(407) 894-1888

BY: /s/
Thomas J. Pilacek

Attorney for IBEW LOCAL 199

# APPENDIX I

## MOTION TO JOIN INDISPENSABLE PARTY OF IBEW LOCAL 199

**10 January 1989**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

CASE NO. 88-143-CIV-FTM-10-C

DAVID O. CONGER, et al.,

Plaintiffs,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, etc., et al.,

Defendants.

_____/

MOTION TO JOIN INDISPENSABLE PARTY

Defendant INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199 [LOCAL 199], through counsel, pursuant to Rule 19(a) Fed. R. Civ. P., hereby moves the Court for an order requiring Plaintiffs to add an indispensable party to the instant proceeding, i. e., United Telephone Company of Florida, Inc., which is alleged to have been a party to the NATIONAL LABOR RELATIONS BOARD proceeding of which Plaintiffs complain, on the basis that it is an indispensable party to the instant action as defined by Rule 19(a), Fed. R. Civ. P.. LOCAL 199 prays that the instant action be dismissed in the event Plaintiffs fail to join UTC as either an involuntary Plaintiff or a party Defendant.

SUPPORTING MEMORANDUM

Plaintiffs have brought a "pioneering" type of lawsuit against LOCAL 199 and the NATIONAL LABOR RELATIONS BOARD which, essentially, complains that because LOCAL 199

[2]was named a party to an official proceeding before the BOARD by United Telephone Company of Florida, and because the BOARD thereafter determined that certain job classifications within a newly added operation of United to its existing business within the Ft. Myers, Florida area was found to be properly within the scope of the bargaining unit represented by LOCAL 199, and because the individuals who happened to occupy these positions at the time of these proceedings were not named parties or given notice of the proceedings by LOCAL 199, the otherwise-lawful result of the proceeding should be voided, and LOCAL 199 removed from its lawfully-determined position of exclusive collective bargaining representative of the job classifications occupied by Plaintiffs.

The problem with Plaintiffs' allegations is that United Telephone Company of Florida, the Employer, was the party who commenced the unit clarification proceeding before the NATIONAL LABOR RELATIONS BOARD in Case No. 12-UC-75, which proceeding gives rise to Plaintiffs' complaint. A copy of the NLRB's decision in that matter is attached to this motion and memorandum as Exhibit "A". In that proceeding the NLRB determined the rights of both LOCAL 199 and UTC; and had UTC not commenced the NLRB proceeding, Plaintiffs would have no claim to state against LOCAL 199. Moreover, Plaintiffs' complaint seeks relief which will affect UTC in its dealings [3]with LOCAL 199.[1]

Accordingly, LOCAL 199 contends that UTC is an indispensable party which must be properly joined as either a Plaintiff or Defendant in this action in accordance with Rule 19(a), Fed. R. Civ. P., in that: (a) in the absence of UTC complete relief cannot be accorded among the NLRB and LOCAL 199, since LOCAL 199 would retain bargaining rights with UTC and UTC a bargaining obligation with LOCAL 199; (b) since these are job classifications created by UTC, UTC necessarily claims an interest

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[1]Indeed, one or more of the Plaintiffs testified as witnesses on behalf of UTC in the proceeding.

relating to the subject of the action (i.e., representation of those job classifications by LOCAL 199); and (c) the disposition of the instant action in UTC's absence may leave LOCAL 199 subject to a substantial risk of incurring inconsistent obligations by reason of UTC's claimed interest, in that LOCAL 199 has fiduciary obligations to the rest of the members of its bargaining unit, who claim through LOCAL 199, as their exclusive representative, that they have a rightful claim upon the job classifications in issue against UTC.

It is obvious that UTC has been a key player[2] in the entire scenario leading to the imposition of Plaintiffs' lawsuit. Contrary to the provisions of Rule 19(c), Fed. R. Civ. P., Plaintiffs fail to explain in their complaint why [4]UTC was not joined as a party, since they initiated the proceeding of which Plaintiffs complain and, presumably, they are just as guilty--if not more guilty--in not providing notice of those proceedings to the Plaintiffs.

Accordingly, LOCAL 199 respectfully suggests that Plaintiffs, as a condition to proceeding further in this action, should be required to join UTC as an additional party Plaintiff and, in the event Plaintiffs and/or UTC fail to do so, that this honorable Court dismiss the instant action with prejudice and award costs and attorneys' fees to LOCAL 199.

I HEREBY CERTIFY that a true copy of the foregoing was mailed to John P. Kelly, Esq. and Stuart Rosenfeldt, Esq., FLEMING, O'BRYAN & FLEMING, Broward Financial Centre, 500 E. Broward Boulevard, P.O. Drawer 7028, Ft. Lauderdale, FL 33338; Edwin V. Vieira, Esq., 13877 Napa Drive, Independent Hill, VA 22111; Hugh L. Reilly, Esq., National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Suite 600, Springfield, VA 22160; and Judy Sherman, Esq., Office of the General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, NW, Washington, DC 20570, this 10th day of January, 1989.

---

[2]if not the producer or director

PILACEK & COHEN
1516 E. Hillcrest Street
Suite 204
Orlando, FL 32803
(407) 894-1888

BY: /s/
Thomas J. Pilacek

Attorney for IBEW LOCAL 199

# APPENDIX J

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Constitution of the United States:**

**First Amendment**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Fifth Amendment**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

**National Labor Relations Act:**

**§ 1, 29 U.S.C. § 151**

**§ 151. Findings and declaration of policy**

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

**§ 7, 29 U.S.C. § 157**

**§ 157. Right of employees as to organization, collective bargaining, etc.**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

## § 9, 29 U.S.C. § 159

### § 159. Representatives and elections

#### (a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

#### (b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed

as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

**(c) Hearings on questions affecting commerce; rules and regulations**

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

**(d) Petition for enforcement or review; transcript**

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required

to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

**(e) Secret ballot; limitation of elections**

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

**§ 10(e), 29 U.S.C. § 160(e)**

**§ 160. Prevention of unfair labor practices**

**(e) Petition to court for enforcement of order; proceedings; review of judgment**

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon

such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

## § 10(f), 29 U.S.C. § 160(f)

### § 160. Prevention of unfair labor practices

### (f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(2)

No. 90-493

Supreme Court, U.S.
FILED
OCT 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1990

DAVID O. CONGER, LEONARD H. ALSENE, THOMAS S. HODGES, PATRICK R. LEON, DENNIS PFROMMER, STARLING ROBERTS, JR., DOMINIC M. SKINNER, and CHRIS YOUNG,

*Petitioners,*

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## RESPONDENT LOCAL 199'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

THOMAS J. PILACEK
Law Offices of:
THOMAS J. PILACEK
2101 W. State Road 434
Suite 105
Longwood, Fl 32779
(407) 774-9500
Counsel of Record
for Respondent
IBEW Local 199

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTION PRESENTED

(WITH REGARD TO LOCAL 199 – RESTATED)

II. Whether the District Court properly dismissed Petitioners' claim against LOCAL 199 when such claim had no legal existence apart from Petitioners' claims against the NATIONAL LABOR RELATIONS BOARD.

## LIST OF PARENT ORGANIZATIONS, SUBSIDIARIES AND AFFILIATES OF RESPONDENT INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO

LOCAL 199 is an autonomous local labor organization located at Fort Myers, Florida. It is affiliated with the International Brotherhood of Electrical Workers, AFL-CIO and with that organization's constituent local and intermediate organizations located throughout the United States. LOCAL 199 has no subsidiaries or dependent organizations.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED (RESTATED) ..... i

LIST OF PARENT ORGANIZATIONS, SUBSIDIARIES, AND AFFILIATES OF RESPONDENT IBEW LOCAL 199 ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

COUNTERSTATEMENT OF THE CASE ..... 1

REASONS WHY CERTIORARI SHOULD BE DENIED ..... 4

A. PETITIONERS RAISE NO CONSTITUTIONAL CLAIM AGAINST LOCAL 199 ..... 4

B. PETITIONERS RAISE NO SUBSTANTIAL LEGAL CLAIM AGAINST LOCAL 199 ..... 4

C. THE DISTRICT COURT'S DISMISSAL OF LOCAL 199 WAS CORRECT ..... 7

CONCLUSION ..... 9

## TABLE OF AUTHORITIES

Page

CASES:

*Electrical Workers vs. Foust*, 447 US 42 (1979) ..... 5

*NLRB vs. Allis-Chalmers Mfg. Co.*, 388 US 175, 181 (1967) ..... 6

*NLRB vs. Jones & Laughlin Steel Corp.*, 301 US 1 (1937) ..... 6

*Steele vs. Louisville & Nashville Railroad Company, et al.*, 323 US 192 (1944) ..... 5

*Vaca vs. Sipes*, 386 US 171 (1967) ..... 5, 6

STATUTES AND OTHER AUTHORITIES:

National Labor Relations Act

§ 9(a), 29 USC § 159(a) ..... *passim*

§ 9(b), USC § 159(b) ..... 5

## COUNTERSTATEMENT OF THE CASE

LOCAL 199 would restate the case brought against it[1] as follows.

Petitioners are former employees of a subsidiary of United Telephone Company of Florida, Inc. ["UTF"] named United Telephone Communications Systems, Inc. ["UTCSI"]. In 1987 UTF disbanded UTCSI and integrated it into its own operations under the classification "Business Services Division" ["BSD"]. BSD's original complement of seven business technicians and one warehouse attendant all came from UTCSI. However, before their employment with UTCSI all seven business technicians had been employees of UTF in a bargaining unit represented by IBEW LOCAL 199, with one having had an intervening position with another UTF subsidiary called "UTELCOM", the predecessor employer to UTCSI. Subsequent to the reintegration, UTF added two new technicians having no prior affiliation with UTCSI. (Petition, p. 60(a))[2]

UTC and its predecessor UTELCOM performed work on accounts received from UTF. These accounts had formerly been serviced by communications technicians within the bargaining unit represented by LOCAL 199.

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[1] For purposes of responding to the Petition LOCAL 199 defers to and adopts the response of the NATIONAL LABOR RELATIONS BOARD with regard to Petitioners' claims against that agency. Should certiorari be granted, LOCAL 199 reserves the right to respond to all issues raised by the petition.

[2] References are to the materials contained within the appendices to the Petition.

When UTF dissolved UTCSI and brought the work back to the BSD, it treated the business technicians and the warehouse attendant as unrepresented employees. (Petition, pp. 60(a)-61(a))

LOCAL 199 claimed that the job categories occupied by the nine technicians and warehouse attendant were within the 1,200-member bargaining unit which it already represented, and demanded to bargain with UTF. UTF disagreed, and filed a unit clarification [UC] petition with the National Labor Relations Board [NLRB or BOARD] seeking to have the Board determine whether the categories were or were not properly a part of the previously certified bargaining unit. (Petition, p. 57(a)) LOCAL 199 then filed an unfair labor practice charge against UTF which alleged that these job categories were simply another name for the "communications technician" job category included within the previously certified unit.

In the UC proceeding UTF claimed that Petitioners' job categories were not properly included within LOCAL 199's certified unit (Petition, p. 57(a), ¶4). That is the identical position taken by Petitioners here.

After an extensive hearing, at which one or more of the Petitioners testified on behalf of UTF, the Board found that even though the duties of the business technicians were remarkably similar to the duties of communications technicians represented by LOCAL 199, nevertheless the positions were not "communications technicians" positions. Because of these similarities, however, the Board determined that the job categories of business technician

and warehouse attendant occupied by Petitioners constituted an "accretion" or addition to the existing bargaining unit and with regard to which UTF was therefore obligated to bargain with LOCAL 199. (Petition, pp. 67(a)-69(a))

After Petitioners filed their complaint with the District Court, the NLRB moved to dismiss on the basis of subject matter jurisdiction. LOCAL 199 filed an Answer Incorporating Defenses which alleged that: (a) the complaint failed to state a claim against LOCAL 199; (b) Petitioners' claim was pre-empted by the Labor-Management Relations Act; and (c) the lower court lacked subject matter jurisdiction. (Petition, pp. 71(a)-75(a)) While preserving these defenses, LOCAL 199 chose preliminarily to file a Motion to Dismiss for failure to add an indispensable party, i.e., UTF, who had initiated the NLRB proceedings forming the subject of Petitioners' claims. (Petition, pp. 76(a)-79(a))

The lower court dismissed the complaint against all parties for lack of subject matter jurisdiction, implicitly reasoning that since no subject matter jurisdiction existed over Petitioners' claims against the NLRB, therefore no jurisdiction existed over Petitioners' claims against LOCAL 199, which depended for their existence upon their claims against the NLRB.

Petitioners appealed the dismissal to the Eleventh Circuit Court of Appeals, which issued a *per curiam* affirmance. They now seek issuance of a Writ of Certiorari from this Court. LOCAL 199 opposes issuance of the Writ.

## REASONS WHY CERTIORARI SHOULD BE DENIED

**The unsoundness of Petitioners' claim that LOCAL 199 violated an alleged duty of fair representation toward them has been clearly determined by this Court in such a fashion so as to foreclose further argument.**

### A. Petitioners Raise No Constitutional Claim Against LOCAL 199

In their District Court complaint Petitioners brought a claim against LOCAL 199 which alleged that by failing to provide Petitioners notice of the UC proceeding LOCAL 199 violated Petitioners' right to freedom of association under the First Amendment. (Petition, p. 32(a)) This was properly determined adversely to Petitioners by the District Court (Petition, p. 6(a)) and the Court of Appeals. Petitioners have abandoned that claim before this Court, by failing to raise it.

### B. Petitioners Raise No Substantial Legal Claim Against LOCAL 199

The gist of Petitioners' remaining claim against LOCAL 199[3] appears to be that since LOCAL 199, having been made a party to a BOARD-conducted UC proceeding by UTF, took the position in that proceeding that the job categories occupied by Petitioners were properly placed within the previously certified unit, therefore LOCAL 199 owed a duty of fair representation toward Petitioners which LOCAL 199 violated by failing to give them notice of the UC hearing. Petitioners have cited no

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[3] Which they incorrectly assert is "independent" of their claims against the NLRB, *see post.*

authority in support of this argument since none exists, *nor could* exist under the very rationale creating the duty.

The flaw in Petitioners' reasoning process is that almost fifty (50) years of uniform precedent by this Court compels the conclusion that no duty of fair representation existed, nor could have existed in law, at the time of the UC hearing. That flaw is fatal to Petitioners' argument for review.

The duty of fair representation ["duty"] arises in the first instance only as a judicially created corollary to the *statutory right or authority* of a union to act as the exclusive bargaining representative of employees *within an appropriate bargaining unit* in their dealings with their employer pursuant to § 9(a) of the Act. *Vaca vs. Sipes*, 386 US 171 (1967); *Electrical Workers vs. Foust*, 447 US 42 (1979).

The seminal decision of this Court which created the duty was *Steele vs. Louisville & Nashville Railroad Company, et al.*, 323 US 192 (1944). That decision, and all which follow, makes clear that the duty arises *only* by virtue of the union's possession of the *actual authority* obtained under law to function as the exclusive collective bargaining representative within a craft or class of employees in their dealings with their employer.

Where, as here, an employer disputes the representational authority of a union to act on behalf of certain employees in the first instance, Congress has empowered the NLRB to act as the exclusive arbiter to define the appropriate bargaining unit within which the union may so function, under § 9(b). This representational bargaining scheme contained in the Act has been expressly

approved by the Court as being constitutional. *NLRB vs. Jones & Laughlin Steel Corp.*, 301 US 1 (1937) Under that scheme, a union's authority, *and the corresponding obligation of the employer to bargain* which is an essential component of that authority, exists when and to the extent the BOARD says it does.

The rationale enunciated by this Court for creation of the duty is to provide an obligation on the part of a union possessing such actual § 9(a) authority to act fairly and impartially on behalf of all employees which it is thereby authorized to represent. *Vaca* at 177; *NLRB vs. Allis-Chalmers Mfg. Co.*, 388 US 175, 181 (1967). Until such authority exists, no duty exists. Although LOCAL 199 possessed § 9(a) authority for the previously certified unit, it did not possess such authority for the positions occupied by Petitioners at the time of the UC hearing; because the BOARD had not yet said it did.

Hence, the duty of LOCAL 199 toward Petitioners did not exist prior to the UC hearing. It arose only after and as the result of the BOARD's determination that the previously certified bargaining unit for which LOCAL 199 possessed § 9(a) exclusive representational authority to bargain with UTF included the job categories occupied by Petitioners in fact and law, at the conclusion of the hearing. LOCAL 199 therefore possessed no obligation by virtue of such duty to notify Petitioners of the hearing which resulted in the BOARD's determination.

This fundamental fallacy in Petitioners' hypothesis, upon which all their "corollaries" and conclusions are based, destroys Petitioners' argument that their claim

against LOCAL 199 is "substantial". Petitioners assert that

> "the premiss [sic] of the accretion-doctrine is that a unit-*clarification* by the NLRB is warranted because the employees to be accreted into the pre-existing unit have *already* become, as a matter of fact and law, members thereof." (Petition, p. 24) (Emphasis in original.)

But such "premise" existed here only *after* the Board had made that factual and legal determination at the *conclusion* of the UC proceeding: not when LOCAL 199 earlier adopted its legal position or "claim" to § 9(a) representation rights in the absence of a corresponding bargaining obligation by UTF, who disputed LOCAL 199's "claim".

Accordingly, § 9(a) can neither logically nor legally be used as the "premise" for imposing a duty toward Petitioners upon LOCAL 199 prior to the UC hearing.

### C. The District Court's Dismissal of LOCAL 199 Was Correct

That same flaw destroys Petitioners' contention that their claim against LOCAL 199 existed "independently" of their claims against the NLRB.[4] Since LOCAL 199 owed Petitioners no duty of fair representation prior to the UC proceeding, Petitioners' contention that they were owed notice thereof rests exclusively upon their claims against the NATIONAL LABOR RELATIONS BOARD,

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[4] Petitioners disingenuously argue regarding their NLRB claims that § 9(a) is unconstitutional (Petition, pp. 13-16); yet their fair representation claim against LOCAL 199 survives only if § 9(a) *is* constitutional.

which established the accretion doctrine and its mechanisms: LOCAL 199 was merely a participant in a proceeding instituted by Petitioners' employer conducted by a government agency under rules which did not require Local 199 to provide notice to Petitioners. The District Court's dismissal of LOCAL 199 together with the NLRB, and on that basis, was therefore proper.

The claim that LOCAL 199 owed a *greater* duty toward Petitioners than either their employer who filed the UC petition and espoused their position thereat; or the NLRB, under whose auspices and procedures the proceedings were conducted, borders on the frivolous and is unworthy of review. Equally frivolous is the contention that review is warranted merely because LOCAL 199 did not file a Rule 12(b) motion seeking dismissal of Petitioners' NLRB claims upon which their claim against LOCAL 199 depends.[5]

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[5] Although not argued in this brief, LOCAL 199 vehemently denies that Petitioners' claims against the NLRB have any semblance of validity. We contend that adoption of those claims by this Court would necessarily render the Act itself useless, for they would completely obvert the bargaining scheme embodied in the Act by requiring an employer to deal with a union through its employees rather than dealing with the employees collectively through the union: at its core, Petitioners' theory governing their NLRB claims would prevent a union from bargaining on behalf of any newly hired employee or any non-union employee in the bargaining unit unless prior notice to and consent of the individual had been accomplished. That is directly antithetical to Congress' intent; and it would destroy the sole basis for imposing a "duty of fair representation" upon a union in the first instance.

## CONCLUSION

In sum, for over forty-six (46) years this Court has consistently maintained that the duty of fair representation arises at some point. That point is when a union actually possesses § 9(a) authority to function as the exclusive representative of an employer's employees within an appropriate bargaining unit. The duty is a check against actions of a union taken by virtue of that authority which are arbitrary in nature. Congress has designated the NLRB the sole determinant of whether that authority exists, having given it the power to define and certify appropriate units. That determination, of which Petitioners complain, was made by the NLRB only after, and as the result of, the UC proceeding. Prior to that determination no duty of fair representation by LOCAL 199 existed toward the Petitioners, according to almost fifty years of this Court's precedents; the logic behind them; and the legal basis for them.

Certiorari should accordingly be denied.

Respectfully submitted,

THOMAS J. PILACEK
Law Offices of:
THOMAS J. PILACEK, ESQ.
2101 W. State Road 434
Suite 105
Longwood, FL 32779
(407) 774-9500
Telecopier: (407) 774-8907

Counsel of Record
for Respondent
LOCAL 199

OCT 26 1990

No. 90-493

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

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DAVID O. CONGER, LEONARD H. ALSENE, THOMAS S. HODGES, PATRICK R. LEON, DENNIS PFROMMER, STARLING ROBERTS, JR., DOMINIC M. SKINNER, and CHRIS YOUNG,

*Petitioners*,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

*Respondents.*

---

**On petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## PETITIONERS' BRIEF IN REPLY TO RESPONDENT LOCAL 199'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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EDWIN VIEIRA, JR.,
*Counsel of Record*
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

HUGH L. REILLY
National Right to Work Legal Defense Foundation
8001 Braddock Road
Springfield, Virginia 22160
(703) 321-8510

*Attorneys for Petitioners*

## TABLE OF CONTENTS

*Page*

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

ARGUMENT ..... 2

CONCLUSION ..... 6

## TABLE OF AUTHORITIES

*Page*

### Cases

J. I. Case Co. v. NLRB, 321 U.S. 332 (1944) . . . . . 2

Communications Workers v. Beck,
487 U.S. 735 (1988) . . . . . 6

Steele v. Louisville & Nashville Railroad,
323 U.S. 192 (1944) . . . . . 2

### Statutory Provisions

National Labor Relations Act

§ 8(a)(1), 29 U.S.C. § 158(a)(1) . . . . . 5

§ 8(a)(2), 29 U.S.C. § 158(a)(2) . . . . . 5

§ 8(a)(3), 29 U.S.C. § 158(a)(3) . . . . . 5

§ 8(a)(5), 29 U.S.C. § 158(a)(5) . . . . . 5

§ 9, 29 U.S.C. § 159 . . . . . 2, 4

§ 9(a), 29 U.S.C. § 159(a) . . . . . 3, 4

§ 9(c)(1), 29 U.S.C. § 159(c)(1) . . . . . 5

### Rules

Rule 15.6 of the Rules of the Supreme Court
of the United States . . . . . 1

No. 90-493

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

DAVID O. CONGER, LEONARD H. ALSENE, THOMAS S. HODGES, PATRICK R. LEON, DENNIS PFROMMER, STARLING ROBERTS, JR., DOMINIC M. SKINNER, and CHRIS YOUNG,

*Petitioners*,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

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**On petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITIONERS' BRIEF IN REPLY TO RESPONDENT LOCAL 199'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

## INTRODUCTION

Pursuant to Rule 15.6 of the Rules of this Court, petitioners David O. Conger *et alia* hereby respond to respondent Local 199's brief in opposition to their petition for a writ of certiorari.

## ARGUMENT

I. Footnote 5 in Local 199's brief encapsulates the erroneous premiss that permeates all the union's arguments.[1] Contrary to that premiss, petitioners do *not* claim that a union may not bargain "on behalf of any newly hired employee or any nonunion employee in the bargaining unit unless prior notice to and consent of the individual has been accomplished". This petition raises *no* issues concerning newly hired employees or nonunion employees already in a bargaining unit. Quite the contrary. Three cases are distinguishable here:

*A.* A union seeks certification as the exclusive representative of a group of previously unrepresented employees who have already been hired under some definite terms and conditions of employment that constitute "property" rights for purposes of constitutional analysis. Once the union has been certified after an NLRB election under NLRA Section 9, the union, in collective bargaining, may enhance or diminish the value of the employees' terms and conditions of employment without violating any "property" right of those employees,[2] subject, of course, to the union's compliance with its duty of fair representation,[3] because the employees have theretofore been afforded sufficient procedural due process through the NLRA's election-machinery. This is not petitioners' case.

*B.* A union which has already been certified as the exclusive representative of a bargaining unit becomes the representative of a newly hired employee upon his *voluntary* entrance into the unit with the knowledge that the union is the representative thereof. Because the new employee had *no* pre-existent "property" right in a job not already subject to collective

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1 Brief in Opposition ("BO") at 8.

2 *Cf.* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

3 *See* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

bargaining through exclusive representation, neither the union nor the NLRB need afford him any procedural due process at all (although, as noted above, the union must satisfy its duty of fair representation). This is not petitioners' case, either.

*C.* A union which has already been certified as the exclusive representative of a bargaining unit seeks to extend its status by the "accretion"-doctrine to other, unrepresented employees already working under their own separate terms and conditions of employment that do constitute "property" rights, where those employees are *un*willing to join the union's unit and where the accretion results in substantial *losses* of contractual benefits by them. Because the involuntarily accreted employees are deprived of "property" rights under color of the NLRA, they are entitled to notice and hearing at appropriate stages in the accretion process. *This* is petitioners' case.

*Pace* Local 199, this Court's acceptance of petitioners' claims *in the accretion-context* would not "necessarily render the [NLRA] useless",[4] because it would simply require that additional parties—the employees objecting to, and victimized by, the accretion—be allowed to participate independently in the NLRB's accretion-proceeding, rather than being subjected without their knowledge and without any recourse to the fictional "representation" of the union (which is actually their antagonist on the accretion-issue) or of the employer (which the NLRA presumes has interests that irreconcilably conflict with those of all its employees on all issues relevant to unionization and collective bargaining).

II. Local 199's argument that petitioners "raise no constitutional claim" against it is doubly specious. *First*, petitioners explicitly argue that, if Local 199 had no duty of fair representation to afford them notice of the very accretion-proceeding that it effectively initiated by asserting its status as their NLRA Section 9(a) exclusive representative, then that section is uncon-

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[4] BO at 8 n.5.

stitutional—and therefore Local 199's pretended status is unconstitutional, too.[5] *Second*, even if (as Local 199 contends) petitioners' claim against it is not independent of their admittedly *constitutional* claim against the NLRB,[6] it remains a *constitutional* claim by nature, if in some sense derivative because it is asserted through petitioners' claim against the NLRB. No logical or legal reason exists to deny that, although a federal District Court might be unable to exercise jurisdiction over the NLRB because of some doctrine of administrative law peculiar to governmental agencies, it cannot adjudicate petitioners' claim against a joint constitutional-tort-feasor—Local 199—over which the court clearly has jurisdiction as a private organization.

III. Local 199 begs the question by pretending that it was not *formally recognized* as petitioners' NLRA Section 9(a) exclusive representative prior to the NLRB's decision on the accretion-petition.[7] The issue is not *formal* recognition by the NLRB, but Local 199's own assertion of exclusive-representational status *vis-a-vis* petitioners in the special context of accretion. If Local 199 may claim the *powers* of an exclusive representative over certain employees by accretion, so as to avoid the otherwise applicable requirement of an NLRA Section 9 election involving those employees, is it not estopped to disclaim the *duties* of an exclusive representative, and principally the duty of fair representation, without which exclusive representation would be palpably unconstitutional? And is not the imposition of that duty implied by the NLRA necessarily contemporaneous with the assertion by the union of the powers the duty circumscribes? But these questions, petitioners submit, answer themselves.

IV. Finally, Local 199 complains that petitioners demand that it bear "a *greater* duty toward [them] than either their

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5 Petition at 25-27.

6 BO at 4 n.3, 7-8.

7 *Id.* at 4-7.

employer who filed the [accretion] petition and espoused their position thereat; or the NLRB, under whose auspices and procedures the proceedings were conducted".[8] This complaint is feckless in the extreme.

*First*, in its self-assumed role as petitioners' exclusive representative Local 199 should bear a "greater duty" than their employer—which the NLRA presumes *never* "espouse[s] their position", and which is statutorily precluded from attempting to do so.[9]

*Second*, the statutory duty of the NLRB under NLRA Section 9(c)(1) to provide petitioners' with "an appropriate hearing upon due notice" is separate from, independent of, and self-evidently *more* extensive than Local 199's duty of fair representation to provide petitioners with notice of its participation in the accretion-proceeding only. And if, as noted above, federal courts lack jurisdiction to enforce such a duty against the NLRB, Local 199 has no basis for complaint against petitioners, but instead should join with them in seeking a determination from this Court that such a supposed jurisdictional bar is unconstitutional.

Actually, the District Court imposed a *lesser* duty on Local 199 than on the NLRB by dismissing petitioners' complaint against the union *without any motion on its part*. Even if the court was correct to dismiss the complaint against the NLRB on jurisdictional grounds, and arguably could have taken this action *sua sponte*, it had no possible *jurisdictional* basis for dismissing the complaint as to Local 199 even had the latter so moved. And the court took this action without notice of or hearing on the issue of Local 199's liability under the duty of fair representation, or

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[8] *Id.* at 8.

[9] *See* NLRA § 8(a)(1, 2, 3, & 5).

even on the court's own—clearly established—jurisdiction over duty-of-fair-representation claims under the NLRA.[10]

## CONCLUSION

For the foregoing reasons, this Court should grant the petition and issue a writ of certiorari.

Respectfully submitted,

EDWIN VIEIRA, JR.,
*Counsel of Record*
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

HUGH L. REILLY
National Right to Work
Legal Defense Foundation
8001 Braddock Road
Springfield, Virginia 22160
(703) 321-8510

*Attorneys for Petitioners*

[10] *See* Communications Workers v. Beck, 487 U.S. 735, 742-44 (1988).

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No. 90-493

# In the Supreme Court of the United States

OCTOBER TERM, 1990

DAVID O. CONGER, ET AL., PETITIONERS

*v.*

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

JERRY M. HUNTER
*General Counsel*

D. RANDALL FRYE
*Acting Deputy General Counsel*

ROBERT E. ALLEN
*Associate General Counsel*

NORTON J. COME
*Deputy Associate General Counsel*

LINDA SHER
*Assistant General Counsel*

LAURENCE S. ZAKSON
*Attorney*
*National Labor Relations Board*
*Washington, D.C. 20570*

## QUESTIONS PRESENTED

1. Whether the district court properly dismissed for lack of subject matter jurisdiction petitioners' complaint seeking review of a National Labor Relations Board unit clarification decision.

2. Whether the district court properly dismissed petitioners' claim that the union violated its duty of fair representation.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 13 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *AFL* v. *NLRB*, 308 U.S. 401 (1940) | 4, 6, 7 |
| *Abilene Sheet Metal, Inc.* v. *NLRB*, 619 F.2d 332 (5th Cir. 1980) | 12 |
| *Bell* v. *Hood*, 327 U.S. 678 (1946) | 11-12 |
| *Bishop* v. *NLRB*, 502 F.2d 1024 (5th Cir. 1974) | 7 |
| *Blue Cross & Blue Shield* v. *NLRB*, 609 F.2d 240 (6th Cir. 1979) | 9 |
| *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) | 9 |
| *Boire* v. *Greyhound Corp.*, 376 U.S. 47. '964) | 7, 8, 9 |
| *Boire* v. *Miami Herald Publishing Co.*, 343 F.2d 17 (5th Cir.), cert. denied, 382 U.S. 824 (1965) | 9 |
| *Breininger* v. *Sheet Metal Workers*, 110 S. Ct. 424 (1989) | 12 |
| *Brooks* v. *NLRB*, 348 U.S. 96 (1954) | 11 |
| *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938) | 8 |
| *Consolidated Papers, Inc.* v. *NLRB*, 670 F.2d 754 (7th Cir. 1982) | 2 |
| *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975) | 9 |
| *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987) | 11 |
| *Fay* v. *Douds*, 172 F.2d 720 (2d Cir. 1949) | 7, 8 |
| *Greensboro Hosiery Mills, Inc.* v. *Johnston*, 377 F.2d 28 (4th Cir. 1967) | 9 |

Cases—Continued: Page

*Hagans* v. *Lavine*, 415 U.S. 528 (1974) ..... 12
*Herald Co.* v. *Vincent*, 392 F.2d 354 (2d Cir. 1968) ..... 8
*Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229 (1917) ..... 9
*Humphrey* v. *Moore*, 375 U.S. 335 (1964) ..... 12
*International Bhd. of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979) ..... 12
*J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944) ..... 10
*Leedom* v. *Kyne*, 358 U.S. 184 (1958) ..... 7
*NLRB* v. *A.J. Tower Co.*, 329 U.S. 324 (1946) .... 11
*NLRB* v. *Allis-Chalmers Mfg.*, 388 U.S. 175 (1967) ..... 9
*NLRB* v. *Burns Int'l Security Services*, 406 U.S. 272 (1972) ..... 11
*NLRB* v. *Interstate Dress Carriers, Inc.*, 610 F.2d 99 (3d Cir. 1979) ..... 9
*NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) ..... 10, 11
*NLRB* v. *Mississippi Power & Light Co.*, 769 F.2d 276 (5th Cir. 1985) ..... 6
*NLRB* v. *Security-Columbian Banknote Co.*, 541 F.2d 135 (3d Cir. 1976) ..... 6
*NLRB* v. *Stevens Ford, Inc.*, 773 F.2d 468 (2d Cir. 1985) ..... 6
*Squillacote* v. *International Bhd. of Teamsters, Local 344*, 561 F.2d 31 (7th Cir. 1977) ..... 9
*Steele* v. *Louisville & N. R.R.*, 323 U.S. 192 (1944) ..... 10-11
*Texas & N.O. R.R.* v. *Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930) ..... 10
*United Glass & Ceramic Workers* v. *NLRB*, 463 F.2d 31 (3d Cir. 1972) ..... 6
*Utica Mutual Ins. Co.* v. *Vincent*, 375 F.2d 129 (2d Cir. 1967) ..... 8
*Vaca* v. *Sipes*, 386 U.S. 171 (1967) ..... 9, 10, 11, 12
*Wallace Corp.* v. *NLRB*, 323 U.S. 248 (1944) ..... 11

Cases—Continued: Page

*West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937) ..... 9

Constitution, statutes, regulation, and rule:

U.S. Const.:
Amend. I ..... 3, 4, 5
Amend. V ..... 3, 5, 9

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 1, 29 U.S.C. 151 ..... 11
§ 9(a), 29 U.S.C. 159(a) ..... 9
§ 9(b), 29 U.S.C. 159(b) ..... 5, 6, 8
§ 9(b)(1), 29 U.S.C. 159(b)(1) ..... 7
§ 9(c), 29 U.S.C. 159(c) ..... 6
§ 9(c)(1), 29 U.S.C. 159(c)(1) ..... 5, 7
§ 9(c)(3), 29 U.S.C. 159(c)(3) ..... 11
§ 10(d), 29 U.S.C. 160(d) ..... 6
§ 10(e), 29 U.S.C. 160(e) ..... 7
§ 10(f), 29 U.S.C. 160(f) ..... 7

29 C.F.R.:
Section 101.17 ..... 6
Section 102.60(b) ..... 6
Section 102.67(b) ..... 3

Fed. R. Civ. P. 12(b) ..... 3

Miscellaneous:

13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (2d ed. 1984) ..... 12

# In the Supreme Court of the United States

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*v.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION**

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## OPINIONS BELOW

The court of appeals' per curiam order (Pet. App. 1a-2a) is unreported, but the decision is noted at 908 F.2d 979 (Table). The district court's opinion (Pet. App. 3a-8a) is not yet reported. The decision issued by the Regional Director of the National Labor Relations Board (Pet. App. 56a-69a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on June 28, 1990. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on September 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. United Telephone Company of Florida (UTC) provides local and long distance telephone service in various parts of the State of Florida. International Brotherhood of Electrical Workers, Local 199, AFL-CIO (the Union) has, for many years, represented UTC's bargaining unit employees.[1] Pet. App. 9a-10a.

In 1987, UTC disbanded one of its subsidiaries and transferred the subsidiary's operations to a new division of UTC. Shortly thereafter, UTC filed a petition with the National Labor Relations Board relating to the nine business technicians and one warehouse attendant – eight of whom are the petitioners herein – who had been transferred from its former subsidiary. The purpose of the petition was to determine whether those employees constitute an accretion to the existing bargaining unit at UTC.[2] Pet. App. 10a, 12a-14a, 52a.

The Board's Regional Office conducted an administrative investigation of the petition and, subsequently, held a hearing. On February 11, 1988, the Regional Director, acting on the basis of the entire record in the proceeding, issued his decision determining that the business technicians and the warehouse attendant constituted an accretion to the existing bargaining unit. Pet. App. 9a-22a. The

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[1] The unit represented by the Union is a broad one, encompassing about 1275 employees in approximately 27 job classifications, including, inter alia, various technicians, mechanics, clerks, operators, and warehouse attendants. Pet. App. 10a, 11a n.3.

[2] "An accretion is the addition of a relatively small group of employees to an existing bargaining unit where these additional employees share a sufficient community of interest with unit employees and have no separate identity. The additional employees are then absorbed into the existing unit without first having an election and are governed by the unit's choice of bargaining representative." *Consolidated Papers, Inc.* v. *NLRB*, 670 F.2d 754, 756-757 (7th Cir. 1982).

Regional Director found that the "[b]usiness technicians and the warehouse attendant perform work very similar, and in many cases identical, to that performed by employees in the established bargaining unit." *Id.* at 20a. Additionally, the Regional Director found that, inasmuch as the existing unit was "wall-to-wall" or nearly "wall-to-wall," there was no basis on which to "carv[e] out a separate unit of business technicians and the warehouse attendant." *Id.* at 21a n.28. The Regional Director further noted "that the business technicians and warehouse attendant constitute a numerically small addition to the existing unit, and * * * could not constitute a separate, appropriate unit." *Id.* at 21a. Accordingly, he ordered that the existing unit be "clarified to include the South Division BSD business technicians and warehouse attendant." *Id.* at 22a.

Pursuant to Section 102.67(b) of the Board's Rules and Regulations, 29 C.F.R. 102.67(b), either UTC or the Union could have filed with the Board a request for review of the Regional Director's decision. Neither party filed such a request.

2. On October 5, 1988, petitioners filed a complaint in the United States District Court for the Middle District of Florida against the Board and the Union alleging that the unit clarification proceeding violated their First and Fifth Amendment rights. Pet. App. 27a-34a. The Board filed a motion to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the ground that the district court lacked subject matter jurisdiction and that the complaint failed to state a claim upon which relief could be granted. Pet. App. 35a-37a. The Union filed an answer to the complaint and a motion to join UTC as an indispensable party. *Id.* at 71a-75a, 76a-79a.

The district court dismissed the complaint for lack of subject matter jurisdiction. Pet. App. 3a-8a. The court

noted that the Board has "broad discretion" in determining "the appropriate scope of a bargaining unit," and that its authority to determine "whether a group of employees should be accreted into that unit" is "clearly" established. *Id.* at 4a-5a. The court further noted that "normally" courts lack jurisdiction to review the Board's decisions in representation matters except where the decision "forms the basis of a final order issued in an unfair labor practice proceeding." *Id.* at 5a (citing *AFL* v. *NLRB,* 308 U.S. 401 (1940)).

Observing that petitioners "try to avoid th[is] jurisdictional limitation by asserting that their constitutional rights to due process and free association have been violated," Pet. App. 5a, the court found petitioners' constitutional arguments to be meritless. With respect to petitioners' First Amendment claims, the court noted that, while "Section 7 of the Labor Act provides * * * that all employees shall have the right either to 'join . . . labor organizations' or to 'refrain from . . . such activities,' " "[t]he rights guaranteed by Section 7 are not unqualified, and one well-recognized limitation results from the principle of exclusive representation embodie[d] in Section [9](a) of the Labor Act." Pet. App. 6a. Thus, "under Section 9(a), the representative selected by a majority of the employees in an appropriate bargaining unit represents all the employees in the unit, including that minority of the employees who did not choose to be represented by it and who would prefer to exercise their Section 7 right to refrain from being represented by it." *Ibid.*[3]

The court further noted that "[t]he Supreme Court [has] recognized that the restraints imposed on individual rights

[3] The court added that, insofar as petitioners claim a violation of a First Amendment right to refrain from compulsory unionism, the "Board's decision does not require [petitioners] to join the Union." Pet. App. 6a.

under the principle of exclusive representation would be wholly unjustifiable unless the exclusive representati[ve] had a reciprocal obligation to fully and fairly represent all the employees." Pet. App. 7a. Accordingly, "[t]he duty of fair representation was conceived as a protection for employees faced with the reduction of their individual rights corresponding with the grant of power to unions to act as their exclusive collective bargaining representative." *Ibid.* "In light of the well established principles governing majority rule and the protections given to the minority," the court concluded, "it is clear that [petitioners'] First Amendment allegation must fail." *Ibid.* The court also rejected petitioners' Fifth Amendment claim. Contrary to petitioners' assertion, "their right to due process has not been violated because they have no recognized property or liberty interest which has been invaded by the Board's decision." *Id.* at 8a. The court therefore dismissed petitioners' complaint for lack of subject matter jurisdiction.

3. The court of appeals summarily affirmed in a per curiam order. Pet. App. 1a-2a.

## ARGUMENT

1. Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b), empowers the Board to determine appropriate bargaining units, and Section 9(c)(1) of that Act, 29 U.S.C. 159(c)(1), empowers the Board to hold representation elections and issue certifications of collective bargaining representatives. With such express authority comes the implied authority to make "changes" in bargaining units, including the clarification of a unit, in light of

"changes in circumstances." See *United Glass & Ceramic Workers* v. *NLRB,* 463 F.2d 31, 35-36 (3d Cir. 1972) (citing Sections 9(b) and 10(d) of the Act, 29 U.S.C. 159(b) and 160(d)). Accordingly, the Board's Rules and Regulations, 29 C.F.R. 102.60(b), provide that "[a] petition for clarification of an existing bargaining unit, * * * in the absence of a question concerning representation, may be filed by a labor organization or by an employer." See also 29 C.F.R. 101.17 ("If there is a certified or currently recognized representative of a bargaining unit and there is no question concerning representation, a party may file a petition for clarification of the bargaining unit.").[4]

Proceedings conducted under the representation provisions of the Act are nonadversarial in nature and their results are not judicially reviewable final "order[s]." *AFL* v. *NLRB,* 308 U.S. 401, 409 (1940). Congress intended to preclude direct judicial review of representation determinations, and to permit indirect review of such determina-

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[4] Unlike an election petition under Section 9(c), 29 U.S.C. 159(c)—which seeks to determine the sentiments toward representation of employees in an appropriate unit—a unit clarification petition is a method of resolving disputes about whether certain new or substantially altered positions are appropriately included in an existing bargaining unit. The "theory of unit clarification" is that, because of their functional similarity to positions within the existing unit, new or substantially altered positions are appropriately included in an existing unit and the employees occupying those positions are properly governed by the larger, existing group's choice of bargaining representative. *NLRB* v. *Mississippi Power & Light Co.,* 769 F.2d 276, 279 (5th Cir. 1985). Accord *NLRB* v. *Security-Columbian Banknote Co.,* 541 F.2d 135 (3d Cir. 1976). This procedure contributes to "industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made." *NLRB* v. *Stevens Ford, Inc.,* 773 F.2d 468, 473 (2d Cir. 1985).

tions only if and when they form the basis for a final order issued in an unfair labor practice proceeding and are reviewable in the court of appeals under Section 10(e) and (f) of the Act, 29 U.S.C. 160(e) and (f). *AFL* v. *NLRB*, 308 U.S. at 404-412; *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964); *Bishop* v. *NLRB*, 502 F.2d 1024, 1027 (5th Cir. 1974).

2. Petitioners seek to bring this case within the narrow exceptions recognized in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and *Fay* v. *Douds*, 172 F.2d 720 (2d Cir. 1949), to the rule that Board representation proceedings are not reviewable by district courts. See Pet. 7-23. That effort does not succeed.

a. In *Kyne*, the Court carved out an exception to the general rule of nonreviewability of Board representation determinations for "an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U.S. at 188. There, the Board had directed an election in an admittedly mixed bargaining unit of professional and nonprofessional employees without first having "a majority of such professional employees vote for inclusion in such unit," as is expressly required by Section 9(b)(1) of the Act, 29 U.S.C. 159(b)(1). In this case, by contrast, there has been no violation of any statutory mandate.

Petitioners contend that the Board violated Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1), by failing to provide them with notice and an opportunity to be heard on the unit clarification issue. Pet. 13, 17 & n.47, 21-22. This contention is meritless. Section 9(c)(1), which applies only to petitions for representation elections, requires notice and a hearing only where the Board finds that there is "reasonable cause to believe that a question of representation affecting commerce exists." By contrast, a unit clarification petition can be processed only where the Board

finds that a question of representation does *not* exist. See p. 6, *supra*. Moreover, a unit clarification proceeding is an incident of the Board's power under Section 9(b), 29 U.S.C. 159(b), to define appropriate units, and that Section has no hearing requirement.[5]

b. Petitioners further contend that the imposition of a union representative without notice, hearing, and an opportunity to vote results in a deprivation of their constitutional rights. Thus, they argue that the decision below conflicts with the holding in *Fay* v. *Douds*, 172 F.2d 720, 723 (2d Cir. 1949), that district courts have jurisdiction over representation proceedings where the plaintiff makes a "not transparently frivolous" assertion that those proceedings violate his constitutional rights. Pet. 7-11, 13-17, 22-23. The district court and court of appeals correctly concluded that petitioners' constitutional claims were patently insubstantial.[6]

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[5] Petitioners also contend, Pet. 19-20, that, even if they lack an express statutory right to notice and an opportunity to be heard in the unit clarification proceeding, such a right must be read into the statute under *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938). That contention is without merit. Unlike the union in *Consolidated Edison*, whose contract rights were affected by the Board's decision, petitioners have no judicially cognizable interest of which they are being deprived. See pp. 9-11, *infra*. Accordingly, here, unlike the situation in *Consolidated Edison*, no notice and hearing requirement must be read into the applicable statutory language to assure its constitutionality.

[6] It is far from clear, however, that the district court would have had jurisdiction even if this matter involved a substantial claim of violation of constitutional rights. This Court has never approved the *Fay* exception. See *Boire* v. *Greyhound*, 376 U.S. at 480-481 (surveying the exceptions to the nonreviewability rule). And its continued validity has been questioned by the circuit that created it—see *Utica Mutual Ins. Co.* v. *Vincent*, 375 F.2d 129, 134 (2d Cir. 1967), and *Herald Co.* v. *Vincent*, 392 F.2d 354, 359 (2d Cir. 1968) (both ques-

Contrary to petitioners' contention, they have no constitutionally conferred right to contract individually with their employer. Pet. 7, 14-16. Thus, while the liberty interest protected by the Fifth Amendment may include a right of the individual to contract in appropriate circumstances, see *Board of Regents* v. *Roth,* 408 U.S. 564, 572 (1972), this is "not an absolute right," but one which may be restricted by government "in the public interest." *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, 392 (1937).

In the area of labor relations, Congress, in order to promote industrial peace, established the principle of collective bargaining through an exclusive representative selected by a majority of the bargaining unit. 29 U.S.C. 159(a). This principle of "necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967). Moreover, the exclusive representation principle "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB* v. *Allis-Chalmers Mfg.,* 388 U.S. 175, 180 (1967). See also *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50, 61-70 (1975); *Vaca* v. *Sipes,* 386 U.S. at 182.[7] While

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tioning whether the *Fay* exception survived *Boire* v. *Greyhound*)—as well as by several other circuits, see *NLRB* v. *Interstate Dress Carriers, Inc.,* 610 F.2d 99, 107 (3d Cir. 1979); *Greensboro Hosiery Mills, Inc.* v. *Johnston,* 377 F.2d 28, 32 (4th Cir. 1967); *Boire* v. *Miami Herald Publishing Co.,* 343 F.2d 17, 21 (5th Cir.), cert. denied, 382 U.S. 824 (1965); *Blue Cross & Blue Shield* v. *NLRB,* 609 F.2d 240, 244-245 (6th Cir. 1979); *Squillacote* v. *International Bhd. of Teamsters, Local 344,* 561 F.2d 31, 37-39 (7th Cir. 1977).

[7] Petitioners' reliance, Pet. 7 & n.14, on *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U.S. 229 (1917), is misplaced. *Hitchman* was decided

individual contracts are not prohibited per se, "[i]ndividual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, *nor to exclude the contracting employee from a duly ascertained bargaining unit* * * * or condition the terms of the collective agreement." *J.I. Case Co.* v. *NLRB,* 321 U.S. 332, 337 (1944) (emphasis added).[8]

Similarly without substance is petitioners' contention that they have a constitutionally conferred "liberty not to associate with unions," which entitles them not to be represented by the statutory bargaining representative. Pet. 7, 20-21. Thus, this Court has definitively established that, in view of the exclusive bargaining representative's duty to represent fairly all employees in the unit,[9] the Constitution does not preclude a minority from being represented by the representative selected by the majority. *Steele* v. *Louisville & N. R.R.,* 323 U.S. 192, 198-201, 204

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before the enactment of both the Wagner Act and the Railway Labor Act, and the language upon which petitioners rely has been superseded by congressional regulation and the case law developed thereunder. See, *e.g., Texas & N.O. R.R.* v. *Brotherhood of Ry. & S.S. Clerks,* 281 U.S. 548, 560-561 (1930); *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 43-44 (1937); *J.I. Case Co.* v. *NLRB,* 321 U.S. 332, 337 (1944).

[8] Petitioners' related contention, Pet. 7—that they have a property right in the compensation, benefits, and working conditions embodied in their individual employment contracts—is predicated on their erroneous assumption that they have an absolute right to individual contracts affording them working conditions different from those embodied in the collective bargaining agreement.

[9] The Act imposes upon a union the obligation to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca* v. *Sipes,* 386 U.S. at 177.

(1944); *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 255 (1944). See *Vaca* v. *Sipes*, 386 U.S. 171, 177, 182 (1967). Moreover, Congress left it largely to the Board to formulate the procedures for determining the bargaining representative of a particular unit and for deciding what employees are to be included in that unit. See *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946). The constitutionality of that regulatory scheme has been upheld by this Court. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46-47 (1937).[10]

c. Contrary to petitioners' contention, Pet. 12-13, 18-19, the decisions below do not conflict with *Bell* v.

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[10] Petitioners contend that, whatever the constitutional status of the exclusive representation principle where the very employees in question have had an opportunity to participate in a Board-conducted election, the principle cannot be constitutionally applied where, as here, the employees being accreted to the unit have not had such an opportunity. Pet. 20-21. In order to be constitutionally entitled to procedural protections, however, one needs to be deprived of a constitutionally protected right. Here, there is no such right. Moreover, the logical premise of petitioners' argument is, in essence, that, in order for the exclusive representation principle to be constitutional, any employee who is newly hired or transferred into a bargaining unit position must be afforded an opportunity to participate in a representation election. Such a result would fundamentally undercut the statutory purpose of promoting industrial stability. See 29 U.S.C. 151 (defining the purpose of the Act as promotion of industrial peace and stability); 29 U.S.C. 159(c)(3) (limiting to one the number of valid elections in any twelve-month period). In the interest of industrial stability, new hires and transferees are required to accept the existing representative of the bargaining unit for certain periods of time even though they did not have an opportunity to be heard or to vote on the selection of that representative. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-39 (1987); *NLRB* v. *Burns Int'l Security Services*, 406 U.S. 272, 279 n.3, 290 n.12 (1972); *Brooks* v. *NLRB*, 348 U.S. 96 (1954) (discussing the Board's contract bar rule and its various presumptions of the union's continued majority status).

*Hood*, 327 U.S. 678 (1946). While that case holds that a federal court may not dismiss for lack of jurisdiction a substantial claim arising under federal law or the Constitution, it recognizes that dismissal for lack of jurisdiction is proper where the claim is "wholly insubstantial and frivolous." *Id.* at 682-683. See *Hagans* v. *Lavine*, 415 U.S. 528, 537 (1974); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3564 (2d ed. 1984). Since petitioner's challenge to the Board's unit clarification decision is clearly insubstantial, the portion of the complaint seeking review of that decision was properly dismissed for lack of subject matter jurisdiction.

3. For similar reasons, petitioners' duty-of-fair-representation claim against the union was properly dismissed for lack of jurisdiction. While the district court has jurisdiction to entertain substantial fair representation claims, *Breininger* v. *Sheet Metal Workers*, 110 S. Ct. 424 (1989), petitioners' claim was wholly devoid of merit. A union's duty of fair representation arises out of its status as the exclusive bargaining representative of the employees in a particular unit. *International Bhd. of Electrical Workers* v. *Foust*, 442 U.S. 42, 46 n.8 (1979); *Vaca* v. *Sipes*, 386 U.S. at 182. A union therefore cannot owe an individual that duty until the individual becomes a member of such a unit. *Abilene Sheet Metal, Inc.* v. *NLRB*, 619 F.2d 332, 346-347 (5th Cir. 1980). See generally *Humphrey* v. *Moore*, 375 U.S. 335, 342 (1964) (the scope of the union's authority to act as exclusive bargaining agent and of its duty to represent employees fairly are "equal"). Here, prior to the Board's clarification of the unit to include petitioners, they were not members of that unit and hence the Union owed them no duty.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

JERRY M. HUNTER
*General Counsel*

D. RANDALL FRYE
*Acting Deputy General Counsel*

ROBERT E. ALLEN
*Associate General Counsel*

NORTON J. COME
*Deputy Associate General Counsel*

LINDA SHER
*Assistant General Counsel*

LAURENCE S. ZAKSON
*Attorney*
*National Labor Relations Board*

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No. 90-493

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# Supreme Court of the United States
OCTOBER TERM, 1990

DAVID O. CONGER, LEONARD H. ALSENE, THOMAS S. HODGES, PATRICK R. LEON, DENNIS PFROMMER, STARLING ROBERTS, JR., DOMINIC M. SKINNER, and CHRIS YOUNG,

*Petitioners*,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL-CIO, and NATIONAL LABOR RELATIONS BOARD,

*Respondents.*

**On petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITIONERS' BRIEF IN REPLY TO THE BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

EDWIN VIEIRA, JR.,
*Counsel of Record*
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

HUGH L. REILLY
National Right to Work Legal Defense Foundation
8001 Braddock Road
Springfield, Virginia 22160
(703) 321-8510

*Attorneys for Petitioners*

## TABLE OF CONTENTS

*Page*

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

ARGUMENT ..... 2

CONCLUSION ..... 10

## TABLE OF AUTHORITIES

*Page*

### Cases

Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938) . . . . . 8

Fay v. Douds, 172 F.2d 720 (2d Cir. 1949) . . . . . 8

### Constitutional provision, statutes, regulations and rule

United States Constitution

Fifth Amendment . . . . . 6-8

National Labor Relations Act

Section 9(b), 29 U.S.C. § 159(b) . . . . . 2-4
Section 9(c)(1), 29 U.S.C. § 159(c)(1) . . . . . 2-4

29 C.F.R.

Section 101.17 . . . . . 3
Section 102.60(b) . . . . . 3

Rules of the Supreme Court of the United States

Rule 15.6 . . . . . 1

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## PETITIONERS' BRIEF IN REPLY TO THE BRIEF OF THE NATIONAL LABOR RELATIONS BOARD

## INTRODUCTION

Pursuant to Rule 15.6 of the Rules of this Court, petitioners David O. Conger *et alia* file this brief in reply to the brief of the National Labor Relations Board ("NLRB").

## ARGUMENT

The NLRB's brief in opposition consists of mere question-begging and assertions of constitutionally unbridled administrative power that highlight the need for this Court to grant the petition.

I. The NLRB first contends that the District Court properly dismissed this case because "Congress intended to preclude direct judicial review of representation determinations" under the National Labor Relations Act ("NLRA"), and "to permit indirect review of such determinations" only in circumstances other than those that obtained in this case .[1] Even if correct in abstract principle, this argument has no practical application here. For petitioners seek to compel no substantive judicial "review" of the NLRB's decision as to the "accretion" *sub judice*, but only to vindicate their own procedural right to participate as parties in the process through which that decision is made in the first instance. Protection of this *ex ante* procedural right is perfectly consistent with preclusion of any *ex post* judicial "review" of the ultimate decision that derives from the process.

II. The NLRB then pretends that, in denying petitioners a right to any procedural protections in the "accretion", "there has been no violation of any statutory mandate".[2] This is arrogant nonsense.

A. The NLRB acknowledges that its full and only competence to hear "accretion" cases derives from the "express authority" in NLRA Sections 9(b) and 9(c)(1) authorizing it to determine appropriate bargaining units for purposes of exclusive representation.[3] However, it then claims that the "statutory

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[1] NLRB Brief at 6-7.

[2] *Id.* at 7.

[3] *Id.* at 5-6.

mandate" in Section 9(c)(1)—explicitly requiring notice and hearing where there is "reasonable cause to believe that a question of representation affecting commerce exists"—does not control in the "accretion" context, not because of another statutory provision, but because the NLRB's administrative rule for "unit clarification" applies "only where the [NLRB] finds that a question of representation does *not* exist".[4] Thus, the NLRB purports, through a mere rule, to define out of existence the very "statutory mandate" that even it concedes is necessary to legitimate—and *ex necessitate* circumscribes the ambit of—that rule!

**B.** Equally vapid is the NLRB's further claim that, notwithstanding the unequivocal language of NLRA Section 9(c)(1), it may proceed as it has in "accretion" cases, under the aegis of Section 9(b) alone, because that section empowers it "to define appropriate units, and * * * has no hearing requirement".[5] The NLRB does not explain why the limited power to "define" a unit —in the typical case, as a prerequisite to affording employees the opportunity to vote on whether they wish to be represented in that unit by some union—implies the unrestricted power to compel employees to accept such representation in an "accretion" case without *any* procedural protections at all.[6] But the absence of such an explanation is no accident. For the structure and purpose of the statute justify no such implication.

The definition of a unit under NLRA Section 9(b) is an administrative conclusion of fact and law as to which the personal

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[4] *Id.* at 7-8, 6 (emphasis in original), *citing* 29 C.F.R. §§ 101.17, 102.60(b).

[5] *Id.* at 8 (footnote omitted).

[6] If the NLRB's statutory power to "define" a unit suffices in *any* situation to permit it to promulgate an administrative rule whereby employees may be subordinated to an exclusive representative without *any* process whatsoever, why need the NLRB conduct elections among employees under any circumstances? That is, if the NLRB's interpretation of NLRA Section 9(b) is correct, then Section 9(c)(1) is superfluous.

views of the affected employees are largely irrelevant: the NLRB must determine whether the purposes of the NLRA will be served by affording employees of a particular type, in a particular industrial setting, an opportunity to accept, or to reject, union representation. The definition of a bargaining unit reflects the NLRB's supposedly "expert" judgment that union representation in that unit, under those conditions, would be consistent with the purposes of the NLRA—*if the employees themselves later choose such representation*. The mere definition of the unit by the NLRB, however, does not subsume, control, foreordain, or even purport to predict that choice by the employees themselves.

For that reason, the alleged absence in Section 9(b) of the statute of procedural protections for the employees at the preliminary and largely contingent stage of unit-definition (if such absence there is) proves nothing about whether there are or must be procedural protections for the employees at the critical operative stage of selection or acceptance of union representation *vel non*, either as a matter of Section 9(c)(1) of the statute itself or as a matter of supervening constitutional requirement.

C. Finally, the NLRB's argument also gratuitously assumes the legitimacy of its notion that "accretion" cases involve *no* question concerning representation. Self-evidently, whatever its arguable cogency with respect to the union and the employer (which already accept the existence of a bargaining unit subject to exclusive representation), this perspective is palpably false with respect to nonunion employees, such as petitioners, who are the involuntary subjects of "accretions". For the whole purpose of an "accretion" is to submit those employees to control by some union the representation of which, through formal membership or otherwise, they never sought and would otherwise never accept.

**III.** The NLRB's position on the constitutional merits of this case is equally invalid.

**A.** The NLRB first impugns petitioners as "contend[ing] that the imposition of a union representative without notice,

hearing, *and an opportunity to vote* results in a deprivation of their constitutional rights".[7] But petitioners have never asserted, and do not now assert, the italicized portion of this contention. Rather, petitioners contend that, because the exclusive-representation scheme of the NLRA infringes on their constitutional right to contract autonomously for employment, that scheme may not be applied to them absent *some form* of notice and hearing that meets procedural-due-process standards. In the case of an original selection of an exclusive representative, which is *not* at issue here, the NLRA provides notice and hearing through an election in which all employees have an opportunity to vote. In the case of an "accretion", which *is* the subject of the instant litigation, the requisite notice and hearing need not take the form of an election—but must nevertheless provide *some* meaningful opportunity for the affected employees (such as petitioners here) to participate in the NLRB's decision-making process, such as through the filing of briefs and presentation of arguments at a hearing on the issue.[8]

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[7] NLRB Brief at 8 (emphasis supplied).

[8] Thus, the NLRB is doubly wrong to claim that "the logical premise of petitioners' argument" is that "any employee who is newly hired or transferred into a bargaining unit position must be afforded an opportunity to participate in a representation election". NLRB Brief at 11 n.10. *First*, a "newly hired or transferred" employee has, before his hiring or transfer, *no* constitutional right as against the employer to a "union-free" environment. Rather, he must take his employment as he finds it; and if he himself *voluntarily* accepts the job or the transfer, he has no basis for complaint because he ends up subject to an exclusive representative. Where, as here, an "accretion" is involved, distinguishably, an "accreted" employee is *involuntarily* included *by the NLRB* within a *pre*-existing bargaining unit, often (again, as here) with a concomitant loss of *pre*-existing employment benefits. In the first case, the newly hired or transferred individual freely accepts a job to which he had no *pre*-existent right, which job happens to exist in a unionized environment. In the second case, an individual who already has a job (and, therefore, *pre*-existent contractual rights) in a nonunionized environment is forced by a governmental agency to accept union-representation as a condition of keeping that job. Obviously, any lack of procedural due process is irrelevant in the former case, because there can be no deprivation of a constitutional right through an individual's acceptance of a job to which he had

**B.** The plain fact is that the NLRB has provided petitioners *no* notice and hearing whatsoever, and brazenly admits as much, saying that

- its "accretion" doctrine "effectively works to deny the accreted employees a right to vote on their choice of bargaining representative";
- "[e]mployees do not have a right [under the NLRB's rules] to a hearing in accretion cases";
- "no statutory review procedure exists allowing an employee to appeal a[n NLRB] representation proceeding";
- "[t]his procedure is unfair to everyone"; and
- petitioners "do not have any due process rights which could have been violated".[9]

The NLRB rationalizes this result by arguing that, although "the liberty interest protected by the Fifth Amendment may include a right of the individual to contract in appropriate circumstances", petitioners' right to contract autonomously "is 'not an absolute right,' but one which may be restricted by

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no *pre*-existent right. *Second*, even in the latter case, the *type* of procedural due process required need not be an actual election. If, as here, only an "accretion" is involved, the process need include no more than notice and an opportunity for the affected employees to participate in an NLRB hearing. Insofar as the NLRB will conduct a hearing anyway, on the petition of the employer or the union, the added participation by the "accreted" employees constitutes no significant burden to anyone—and certainly cannot "fundamentally undercut the statutory purpose of promoting industrial stability", as the NLRB disingenuously claims to fear. *See* NLRB Brief at 11 n.10.

[9] Appendix to Petition at 44a-45a, 49a n.12, 50a, 50a n.13.

government 'in the public interest.'"[10] Although true as an abstract principle, this statement does not answer the question posed by the instant petition as to whether, in the "circumstances" of an "accretion", any "restrict[ion]" of this "liberty interest protected by the Fifth Amendment" must afford the affected employees at least minimal procedural due process. But the answer to this question is self-evident: *no* "liberty interest protected by the Fifth Amendment"—"absolute" or "*non*-absolute"—may be "restricted by government", even "in the public interest", without appropriate procedural due process.[11]

Here, the NLRB has repeatedly admitted that its "accretion" doctrine provides affected employees *no* procedural due process of *any* kind. Therefore, the NLRB's position is justifiable only if petitioners' "liberty interest protected by the Fifth Amendment" can be "restricted"—or, more descriptively put, annihilated altogether—*without* such process.

C. To the resolution of this issue, cases dealing with "the principle of collective bargaining through an exclusive representative selected by a majority of the bargaining unit"[12] are not helpful. For these cases assume *sub silentio* that an exclusive representative has been properly selected, and address only the authority of the representative *vis-a-vis* the employees thereafter.

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[10] NLRB Brief at 9.

[11] The NLRB's fixation on the "*non*-absolute" nature of petitioners' right is childish. If a right is "absolute", government may not constitutionally restrict it, in any way, no matter what procedure is employed. The entire corpus of this Court's procedural-due-process case-law, therefore, necessarily involves "*non*-absolute" rights the "restrict[ion]" of which by government nevertheless requires appropriate procedures. Thus, to say that a right is "not absolute" merely frames the further inquiry as to what procedure is requisite for the "restrict[ion]" of that right "in the public interest". It certainly does not follow that, because a right is "not absolute", therefore that right may be obliterated without any procedural due process at all, as the NLRB contends here.

[12] NLRB Brief at 9-10.

*No* case cited by the NLRB holds that any employee may be subordinated to an exclusive representative, for any reason, without *any* modicum of procedural due process.

Thus, the controlling case here remains *Consolidated Edison Co. v. NLRB*.[13] The NLRB pretends that *Consolidated Edison* does not apply, because (supposedly) "petitioners [here] have no judicially cognizable interest of which they are being deprived".[14] But, when this assertion is measured by the NLRB's frank admission that "the liberty interest protected by the Fifth Amendment may include a right of the individual to contract in appropriate circumstances",[15] the NLRB's pretense collapses under the weight of the self-contradiction.[16]

**IV.** The NLRB's attempt to salvage the District Court's *sua sponte* dismissal of petitioners' duty-of-fair-representation claims against Local 199 also fails. On the one hand, the NLRB argues that, "prior to [its] clarification of the unit to include petitioners, they were not members of that unit and hence the Union owed them no duty".[17] Yet, on the other hand, the NLRB properly explains the "theory of unit clarification" as presuming that, "because of their functional similarity to positions within the existing unit, new or substantially altered positions are appropriately included in an existing unit and the employees occupying those positions are properly governed by the larger, existing

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[13] 305 U.S. 197 (1938).

[14] NLRB Brief at 8 n.5.

[15] *Id.* at 9.

[16] In addition, *Consolidated Edison* is evidence that petitioners' claims are cognizable even if the so-called "exception" of *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), does not apply. *See* NLRB Brief at 8 n.6.

[17] NLRB Brief at 12.

group's choice of bargaining representative".[18] The juxtaposition of these statements frames—but hardly answers—the question of whether, under the "theory of unit clarification", the union must be presumed to owe "accreted" employees such as petitioners some minimal procedural-due-process duty of fair representation when it seeks to assert against them the "existing group's choice of bargaining representative", by which "choice" the union is, in fact (if not by formal NLRB decree), *already* the "accreted" employees' representative in a functional sense.

In any event, the NLRB's view that Local 199 had no duty to provide petitioners with notice of the NLRB's "accretion" hearing emphasizes why the NLRB itself had that duty. For, on the view expressed here by the NLRB, no one had that duty, and, as a result, petitioners were deprived of their rights with no notice at all. The question to be answered here thus remains: Can such a *procedureless* deprivation occur without violating the statute or the Constitution?

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[18] *Id.* at 6 n.4.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition and issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

HUGH L. REILLY
National Right to Work Legal
Defense Foundation
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

EDWIN VIEIRA, Jr.
*Counsel of Record*
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

*Attorneys for Petitioners*

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